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State Antitrust in the Federal Scheme†

HERBERT HOVENKAMP*

INTRODUCTION

Before 1890, when the first federal antitrust statute was enacted, restraints of trade were regulated largely by state law.¹ Neither the United States Congress that enacted the Sherman Act² nor subsequent Congresses that enacted the other federal antitrust laws meant to change the scope of state regulation. The legislative history of the federal antitrust law indicates that Congress intended to leave state antitrust enforcement more or less intact but to provide an additional federal forum for dealing with restraints of trade which exceeded the jurisdiction of the courts of any particular state.³

The result of this intention is that antitrust enforcement has theoretically existed on two different levels, federal and state.⁴ However, two things limited state participation. The first was the relatively awesome power of federal antitrust law, which generally provided broad liability, aided by a federal judicial system that was aggressive and enthusiastic about antitrust enforcement. The second phenomenon was the perceived

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¹ See Eaton, *On Contracts in Restraint of Trade*, 4 HARV. L. REV. 128 (1890); Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 207 (1926); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956); Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215 (1953).

² Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890) (amended 1976).

³ See R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 600, 112 Cal. Rptr. 585, 589 (1974); J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* 150 (1964); See generally Rubin, *Rethinking State Antitrust Enforcement*, 26 FLORIDA L. REV. 653 (1974).

⁴ One must add the word "theoretically" because during substantial periods of American history, state antitrust law languished, in some states to the point of near nonexistence. See Project, *Reviving State Antitrust Enforcement: the Problems with Putting New Wine in Old Wine Skins*, J. CORP. L. 547, 555 (1979) [hereinafter cited as Project].

jurisdictional limits of the state courts. At various times, many state courts concluded that their jurisdiction was limited to activities that either were not involved in interstate commerce or which had no effect on interstate commerce.⁵ Many of those decisions—at least those based on perceived limits imposed upon the states by federal law—are of dubious vitality today.

For a half century after the Sherman Act's passage, courts and many commentators adopted a rather facile distinction between the proper jurisdictional limits of federal and state antitrust law. Federal law applied to restraints that were "in or affecting" interstate commerce. State law, on the other hand, applied to purely "local" restraints. The limits on state antitrust jurisdiction were not often questioned, since in most cases it was to a plaintiff's advantage to plead his case under federal law in a federal court.

Today, however, the constitutional and statutory limits on state antitrust enforcement are much less restrictive than in the past. Now no one doubts that state courts can reach persons located outside the forum state,⁶ or that state legislatures have the authority to condemn certain acts that take place outside the state.⁷ State antitrust law reaches many things "in or affecting" interstate commerce.⁸ The result is an immense overlap between federal and state antitrust authority.

More importantly, the notion that federal antitrust law is aggressive while state law is passive is largely a thing of the past. Since the early

⁵ *Paramount Public Corp. v. Hill*, 11 F. Supp. 478 (W.D. Wis. 1932). *But see* *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910). *State v. Fullerton Lumber Co.*, 35 S.D. 410, 152 N.W. 708 (1915); *First Nat'l Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 152 S.W. 378 (1912); *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242 (8th Cir. 1906). *See generally* Cooke, *The Adequacy of Remedies Against Monopoly Under State Law*, 19 YALE L.J. 356 (1910); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

One should distinguish from the above cases those instances in which courts have held and continue to hold that as a matter of state law some state antitrust statutes will not reach activities in or affecting interstate commerce. *See* *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403 (5th Cir. 1962); *Kosuga v. Kelly*, 257 F.2d 48 (7th Cir. 1958), *aff'd on other grounds*, 358 U.S. 516 (1959); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980); *Three J Farms, Inc. v. Alton Box Bd. Co.*, 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Sloan v. Miami Margarine Co.*, 247 S.W.2d 169 (Tex. Civ. App. 1952).

⁶ *See* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *St. Joe Paper v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1982). Von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983). McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1 (1982); Comment, *Constitutional Limitations on State Long-Arm Jurisdiction*, U. CHI. L. REV. 156 (1982).

⁷ *See* *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977); *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974). *See generally* Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

⁸ *See* *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974); *Commonwealth v. McHugh*, 326 Mass. 249, 265, 93 N.E.2d 751, 762 (1950); J. FLYNN, *supra* note 3, at 71-72.

1970's the United States Supreme Court has gradually restricted the scope of federal antitrust liability and narrowed the range of private persons who may sue for antitrust violations.⁹ On the other hand, many states have broadened the scope of their antitrust laws and have granted standing to a broader class of plaintiffs than have a cause of action under the federal laws. As a result, activities that are not illegal under federal law are condemned by the antitrust law of some states.¹⁰ Furthermore, some persons who have suffered injury because of antitrust violations have a damages action under various state antitrust laws while they have no such action under the federal statutes.¹¹

⁹ See, e.g., *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁰ As a general matter, state antitrust laws are substantively similar to federal antitrust law, and many state courts have held that case law interpreting the federal statutes is fully applicable to corresponding state statutes. See Rubin & Malet, *State Initiatives in Antitrust Investigation*, 4 J. CORP. L. 513, 514 (1979); Project, *supra* note 4, at 617-20. Some state statutes expressly provide that they shall be interpreted by federal standards; e.g., MO. ANN. STAT. § 416.141 (Vernon, 1979); however, as a result either of statutory language or judicial interpretation, some state antitrust laws are now broader than federal law. For example, see MD. ANN. CODE, art. 56, § 157E (1977) which not only forbids any producer or refiner of petroleum products from operating retail gasoline stations within the state, but also requires wholesalers of petroleum products to "extend all voluntary allowances uniformly to all retail service station dealers supplied" in the state. The statute appears to require virtual wholesale price uniformity, and is therefore far more rigid than the price discrimination provisions of the Clayton Act, 15 U.S.C. §§ 12-27 (1974), as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1976). The constitutionality of the statute was upheld in *Exxon Corp. v. Governor of Md.*, 437 U.S. 121 (1978). See *infra* notes 64-70 and accompanying text. Likewise, *Shell Oil Co. v. Younger*, 587 F.2d 34 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979), held that the price discrimination provision of the California antitrust law, CAL. BUS. & PROF. CODE § 21200 (Deering 1975), is not preempted by federal law even though it is broader and requires more price uniformity than the federal Robinson-Patman Act. *W. Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1048-49 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57-58 (1982), held that the California statute prohibiting predatory pricing, CAL. BUS. & PROF. CODE §§ 17026, 17029, 17073 (Deering 1976), is not preempted by federal law even though the California statute appears to condemn pricing below average total cost, while most interpretations of federal law have held that pricing must be below average variable cost in order to be presumptively illegal. See also *G.H.I.I. v. MTS, Inc.*, 195 Cal. Rptr. 211, 223 (Cal. App. 1983) (same). *W.J. Seufert Land Co. v. National Restaurant Supply Co.*, 1973-2 Trade Cas. (CCH) ¶ 74,643 at 94,819 (Ore. 1973), found a more stringent test for mergers under Oregon law than exists under federal law. *Three J Farms, Inc. v. Alton Box Bd. Co.*, 1971-1 Trade Cas. (CCH) ¶ 62,423 at 76,548 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980), noted that under South Carolina law, a prevailing plaintiff can recover "a return of the full purchase price" rather than three times the overcharge as permitted by federal law; see Ohio's antitrust statute, the Valentine Act, OHIO REV. CODE ANN. §§ 1331, 1331.12 (1980) providing that no "statute of limitations shall prevent or be a bar to any suit or proceeding for any violation of" the Act. The federal antitrust laws contain a four year statute of limitations. 15 U.S.C. § 15b (1976); see also *Mendelovitz v. Coors Co.*, 693 F.2d 570, 578-79 (5th Cir. 1982), suggesting that the Texas antitrust statute does not contain a requirement of injury to competition.

¹¹ For example, five states have responded to *Illinois Brick* by amending their own antitrust statutes to give a damages action to indirect purchasers. See CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1980) (as amended by Act of Aug. 24, 1978, ch. 536, 1978 Cal. Stat. 1693); HAWAII REV. STAT. § 480-14(c) (Supp. 1980); ILL. ANN. STAT. ch. 38, § 60-7(2) (Smith-Hurd

The result of these related phenomena is that people who at one time would naturally have carried their antitrust complaints to federal court now choose state court, even though the alleged illegal acts were clearly in interstate commerce, or were committed outside the state whose law is being applied.¹²

The new enthusiasm about state antitrust law places some difficult burdens on the two-tier, federal-state, antitrust enforcement scheme. First, state rules creating liability or giving rights of action can interfere with the federal system of antitrust enforcement when state law is different from federal. For example, indirect purchaser lawsuits under state law can play havoc with federally created mechanisms for improving the efficiency of private antitrust enforcement and damages allocation. Secondly, certain applications of state antitrust laws can defeat the strong federal interest in efficient and nonrepetitive litigation. Even state statutes identical in their coverage with federal law can be applied so as to subvert federal interests in the efficient administration of justice. This article examines some of these growing tensions in the two-tier, federal-state, antitrust enforcement scheme.

CONGRESSIONAL INTENT AND STATE ANTITRUST

Two conclusions seem rather clear about the intent of the Fifty-First Congress, which debated and passed the Sherman Act in 1890.¹³ First, Congress envisioned a two-level enforcement scheme in which federal law would supplement but not replace, state antitrust law. Second, the Fifty-First Congress perceived the relationship between state and federal antitrust law so differently than we perceive it today, that issues of congressional "intent" on this subject are virtually moot.

At no time in the extensive congressional debates on the Sherman Act did any member of Congress suggest that the Sherman Act should preempt all state antitrust law. On the contrary, the legislative history of the Sherman Act is replete with statements that the Act was designed to supplement rather than to abrogate existing state antitrust enforce-

Supp. 1981); N.M. STAT. ANN. § 57-1-3(A) (Supp. 1980); WIS. STAT. ANN. § 133.18(1) (West Supp. 1980). Alabama and Mississippi permitted indirect purchaser damages actions even before *Illinois Brick* was decided. ALA. CODE § 6-5-60(a) (1975); MISS. CODE ANN. § 75-21-9 (1973). See generally Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, 34 STAN. L. REV. 203 (1981).

¹² See, e.g., *St. Joe Paper Co. v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), cert. denied, 445 U.S. 982 (1982) (holding that a price-fixing conspiracy created and effected outside California could give rise to a damages action by indirect purchasers in California under the state antitrust act). See generally Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement*, 4 J. CORP. L. 479 (1979).

¹³ 15 U.S.C. §§ 1-7 (1976).

ment, but to leave that enforcement itself unaffected. Senator Sherman argued that one purpose of the Sherman Act was

to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states. It is to arm the Federal courts within the full limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States¹⁴

In the same statement, however, Senator Sherman attempted to explain why he believed federal supplementation of state antitrust was necessary: "If the combination is confined to a state, the state should apply the remedy; if it is interstate and controls any production in many states, Congress must apply the remedy."¹⁵

The Senator's paradigm was simple: if a restraint on trade was located entirely within a state, it was out of congressional reach. On the other hand, if a combination or conspiracy was located in more than one state, then the entire combination was beyond the jurisdictional power of the state legislature and the state court.

Senator Sherman's perception of the relationship between state and federal power was correct in 1890,¹⁶ but has lost its vitality today. Federal antitrust law now easily reaches many restraints that are "confined" to a state, provided that there is an effect on interstate commerce.¹⁷ On the other hand, state antitrust laws have been used repeatedly to reach restraints that are located entirely or in part in a different state.¹⁸

The Limits of State Court Jurisdiction: 1890

When the Sherman Act was passed in 1890, the constitutional limit of state judicial jurisdiction was governed by *Pennoyer v. Neff*,¹⁹ in which Justice Field concluded:

¹⁴ 21 CONG. REC. 2456-57 (1890).

¹⁵ 21 CONG. REC. 2457 (1890).

¹⁶ See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890).

¹⁷ *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

¹⁸ See Rubin, *supra* note 3, at 671-74 (1974). See generally Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961). See *St. Joe Paper v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1982); *Standard Oil Co. of Ky. v. Tennessee*, 217 U.S. 413 (1910); *Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

¹⁹ 95 U.S. 714 (1877).

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be "resisted as mere abuse."²⁰

In fact, Pennoyer's doctrine of judicial jurisdiction was built on a generalized concept of territoriality that somewhat intermixed more modern notions of judicial and legislative jurisdiction. Justice Field observed that there were "two well-established principles" governing the jurisdictional power of a state:

One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as allowed by comity²¹

Not only were the state courts of the nineteenth century incapable of asserting jurisdiction over persons outside the state, state legislatures were generally thought to be incapable of proscribing conduct that occurred outside the geographic borders of the state.²² Senator Sherman echoed this view of the law in 1890.²³

Although the question of extraterritorial application of state antitrust laws did not often arise in the late nineteenth and early twentieth

²⁰ *Id.* at 720.

²¹ *Id.* For further analysis of views of state adjudicatory jurisdiction at this time, see Hovenkamp, *Federalism Revised* (Book Review), 34 HASTINGS L.J. 201 (1982).

²² See Chief Justice Taney's conclusion in *Ableman v. Booth*, 62 U.S. 506, 524 (1858): "No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *In re Grice*, 79 F. 627 (N.D. Tex. 1897), *rev'd on other grounds sub nom.* *Baker v. Grice*, 169 U.S. 284 (1898) (Texas antitrust law condemning conduct occurring outside the state declared unconstitutional); *Milliken v. Pratt*, 125 Mass. 374 (1878). In the international context, see J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7, at 8 (7th ed. 1872). For a brief history of state legislative jurisdictional concepts see G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 54-68 (2d ed. 1951).

²³ Senator Sherman said,

These modern combinations are uniformly composed of citizens and corporations of many States, and therefore they can only be dealt with by a jurisdiction as broad as their combination. The State courts have held in many cases that they cannot interfere in controlling the action of corporations of other states. If corporations from other States do business within a State, the courts may control their action within the limits of the State, but when a trust is created by a combination of many corporations from many states, there are no courts with jurisdiction broad enough to deal with them except the courts of the United States.

21 CONG. REC. 2460 (1890).

centuries,²⁴ one can determine something about the extraterritorial limits of antitrust law at that time by looking at the first case the Supreme Court decided respecting the extraterritorial application of the Sherman Act. In *American Banana Co. v. United Fruit Co.*,²⁵ the defendant, a New Jersey corporation, and certain aliens including the government of Costa Rica were accused of conspiring to monopolize the market in bananas to be shipped into the United States. All the allegedly illegal acts occurred outside the United States.

Writing for a unanimous Court,²⁶ Justice Holmes noted that the plaintiff's case depended on "several rather startling propositions," the first of which was that acts committed outside the United States could be governed by the Sherman Act: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²⁷

Obviously, wrote Holmes, the broad language of the Sherman Act suggesting that it be applied to "every contract in restraint of trade" or

²⁴ The Federal District Court for the Northern District of Texas decided the issue squarely against extraterritoriality in 1897, although the Supreme Court subsequently held that the lower court did not have jurisdiction. *In re Grice*, 79 F. 627 (N.D. Tex. 1897), *rev'd on other grounds sub nom.* *Baker v. Grice*, 169 U.S. 284 (1898). At issue was a Texas anti-trust statute that provided, in part, that

Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

Tex. Stat., March 30, 1889. In examining this part of the Texas statute, the federal judge observed that

It has been properly suggested that, should this feature of this act be carried out and administered, it would be unnecessary for any other state or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and in the conduct of their business according to the wishes of the legislature of Texas. . . . [T]hat part of the act which proposes this extraterritorial jurisdiction is absolutely null and void.

79 F. at 639. The basis of the holding was the fourteenth amendment due process clause.

See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), frequently cited for the proposition that the due process clause gives a private citizen the right to contract for insurance as he chooses; but more properly standing for the doctrine that a state has no right to declare illegal an insurance contract made by one of its citizens in another state:

[The contract at issue] was a valid contract, made outside the State, to be performed outside of the State, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract . . . must have the liberty [to enforce the contract] within the limits of the State, any prohibition of the state statute to the contrary notwithstanding.

165 U.S. at 592.

²⁵ 213 U.S. 347 (1909).

²⁶ The elder Justice Harlan concurred.

²⁷ *American Banana*, 213 U.S. at 355.

"every person who shall monopolize" must be taken to mean "only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."²⁸ In this particular case not only were the acts complained of "not within the Sherman Act, but they were not torts by the law of the place [where they were committed], and therefore were not torts at all, however contrary to the ethical and economic postulates" of the Sherman Act.²⁹

The Limits of State Court Jurisdiction: 1983

Today, the notion of the extraterritorial limits of state adjudication and legislation is much broader than it was eighty years ago. *International Shoe v. Washington*³⁰ and its offspring³¹ have considerably broadened the power of state courts to reach persons located outside the state.³² Likewise, the question of legislative jurisdiction—the power of a state to apply its law to a transaction or event outside the state—is determined by looking more to the interest of the state in applying its law and less to the place where the event occurred.³³ State courts frequently use state antitrust laws to condemn activities occurring outside the state if the violation has a sufficient effect within the state so that the state may justifiably assert its own law.³⁴

Federal Power to Legislate Under the Commerce Clause: 1890

One of the most hotly discussed issues in the congressional debates over the Sherman Act was the power of Congress under the commerce

²⁸ *Id.* at 357.

²⁹ *Id.* See also *Slater v. Mexican Nat'l Railroad*, 194 U.S. 129 (1904) (state may not apply its law with respect to a death that occurred in Mexico). But see *Hammond Packing v. Arkansas*, 212 U.S. 322, 343 (1909) (state may revoke permission to do business within the state given to corporation engaged in antitrust violations in other states).

³⁰ 326 U.S. 310 (1945).

³¹ See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); see generally Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

³² See generally von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983); Brilmayer, *How Contacts Count*, 1980 SUP. CT. REV. 77; Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

³³ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); Korn, *The Choice-Of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Reese, *supra* note 7. See generally Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981). But see Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981).

³⁴ See *St. Joe Paper Co. v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981); *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974).

clause to regulate restraints or combinations in manufacturing industries. Senator Sherman repeatedly defended his proposed statute from challenges that manufacturing could not be regulated by Congress because manufacturing is not "commerce" within the meaning of the commerce clause. Those Senators and Congressmen who had the most restrictive view of congressional power under the commerce clause believed that Congress could not regulate "manufacturing" even if the manufactured products were intended for interstate shipment.³⁵ Senator Sherman, who had an expansive notion of federal power, argued that his proposed legislation was constitutional because it did not apply to property or combinations located entirely within a single state, but only to a trust or combination that extended into two or more states or which involved interstate transportation.³⁶

In the entire legislative history of the Sherman Act, Senator Sherman's view of federal power under the commerce clause was the broadest: the new federal statute would reach combinations whose members or assets were located in more than one state, but not those entirely within a state. This view, as it turned out, was more expansive than the Supreme Court initially permitted. In *United States v. E.C. Knight Company*,³⁷ decided only five years after the Sherman Act was passed, the Supreme Court agreed with Senator George that manufacturing is not commerce, and, thus the Sherman Act would not reach a manufacturing trust composed of virtually all America's sugar refineries located in several states.³⁸

The Sherman Act as contemplated by its framers worked in a clearly articulated harmony with state antitrust laws. In the narrow view, subsequently confirmed by the Supreme Court in *E.C. Knight*, the Act applied only to goods in the flow of commerce or to restraints on interstate transportation itself.³⁹ In the broad view espoused by Senator Sherman,

³⁵ For example, Senator James Z. George (D. Miss.), a former Chief Justice of the Supreme Court of Mississippi, argued that

the power of Congress exists only over the subject [of interstate commerce], so far as it comes from transportation, while the transportation is being carried on; that the power of Congress does not begin as to the subject until transportation begins, and it ends when transportation is completed. . . . The regulation must be of the act or the transaction of commerce itself.

20 CONG. REC. 1460 (1889).

And see Senator George's statements in 21 CONG. REC. 1769 (1890): "[W]hen the article of commerce has begun to move—not begun to be produced with an intent to move—from one State to another, then at that time interstate commerce in that commodity has commenced. Not before that time, but then, at the commencement of the interstate movement." See *Veazie v. Moor*, 55 U.S. 568 (1852); *Lord v. Goodall, Nelson & Perkins S.S. Co.*, 102 U.S. 541 (1881), upon which Senator George relied.

³⁶ 21 CONG. REC. 2462 (1890).

³⁷ 156 U.S. 1 (1895).

³⁸ *Id.* at 12 ("Commerce succeeds to manufacture, and is not a part of it.").

³⁹ The Supreme Court had no problem with subject matter jurisdiction two years later in *United States v. Trans-Mo. Freight Assn.*, 166 U.S. 290 (1897), when the alleged combination involved the market for interstate rail transportation.

the Act also reached combinations or conspiracies in restraint of trade if those restraints involved operatives or property in more than one state. Under both views, however, any combination or conspiracy whose members were entirely within a single state fell within the exclusive jurisdiction of the states themselves—regardless of the intended destination of the products. Federal antitrust law and state antitrust law were intended to be applied to mutually exclusive activities.⁴⁰

Federal Power to Legislate Under the Commerce Clause: 1983

The original understanding of the Sherman Act's framers concerning the commerce clause reach of the statute, and the opinion in *E.C. Knight*, are both ancient history. *E.C. Knight* was overruled fifty years later in another sugar case which held that a price-fixing agreement among local refiners all located within one state was within the reach of the Sherman Act.⁴¹

Today very little of the intent of the Fifty-First Congress with respect to this issue remains.⁴² Nonetheless, in spite of the fact that the foundation of congressional intent concerning the relationship between state and federal antitrust law has been thoroughly uprooted, state antitrust law is continually justified and defined by this same congressional "intent."⁴³

THE PLAINTIFF'S CHOICE OF LAW: THE EXPANDING
SCOPE OF STATE ANTITRUST PROTECTION

Not only has the 1890's notion of the extraterritorial limits of state power all but vanished; the idea that federal antitrust law is aggressive while state antitrust law is relatively passive is rapidly dying as well. It is no longer a foregone conclusion that if an effect on interstate commerce is present, a plaintiff would fare better under federal law than in a state court under state law.

A plaintiff might opt for state law for a number of reasons: (1) the state

⁴⁰ *E.C. Knight*, 156 U.S. at 13.

⁴¹ *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

⁴² For an account of the expansion of federal power under the commerce clause, see Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 883 (1946); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 232-38 (1978).

⁴³ See *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 407-08 (1981) (Brennan, J., dissenting); *State v. Lawn King*, 150 N.J. Super. 204, 375 A.2d 295, 301 (N.J. Super. Ct. Law Div. 1977), *rev'd on other grounds*, 169 N.J. Super. 346, 404 A.2d 1215 (N.J. Super. Ct. App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980). Project, *supra* note 4, at 565-69. See generally, Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SEC. REP. 358 (1962). It may have been the intent of the Fifty-First Congress to reserve to the states the right to entertain suits for actual damages, while reserving to the federal courts the authority to award treble damages. If so, congressional intent appears to have been disregarded. See Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 n.13 (1957).

antitrust law might condemn some activity that would be permissible under federal law;⁴⁴ (2) the plaintiff might have standing or an action for damages under state law but not under federal law;⁴⁵ (3) the plaintiff might wish to avail itself of a more flexible state procedural rule, such as the relatively liberalized class action damages rules that prevail in some states;⁴⁶ (4) the plaintiff might wish to avoid consolidation and transfer with other parties in a large, multidistrict federal antitrust proceeding.⁴⁷

As a general rule, a plaintiff has a right to opt for state antitrust law for these reasons or for any others. Implicit in the doctrine of federalism and our countenance of a two-tier, federal-state antitrust enforcement scheme is a concession that state legislatures and state courts are entitled to be different. Nevertheless, under certain circumstances a plaintiff's choice to plead state law can cause substantial difficulty for private enforcement of federal antitrust, particularly in view of the greatly expanded extraterritorial reach of state antitrust laws.

Commerce Clause Limitations on State Antitrust

It is sometimes said that the commerce clause of the United States Constitution imposes substantial limits on the power of states to apply their antitrust statutes to activities in or affecting interstate commerce.⁴⁸ In fact, however, there is reason to doubt that this is the case. Today, the power of states to regulate under the commerce clause must be viewed in the context of three paradigms. First, in areas where Congress has not spoken, the "dormant" commerce clause restricts the power of states to pass regulations that interfere with the free flow of goods and services from one state to another or impose greater burdens on interstate commerce than they impose on purely local activities.⁴⁹ Second, in areas

⁴⁴ See cases cited *supra* note 10.

⁴⁵ See *supra* note 11.

⁴⁶ See *Bruno v. Superior Ct.*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981) (permitting fluid recovery in a state antitrust class action); *Ohio ex rel. Brown v. Klosterman French Baking Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,361 (S.D. Ohio 1977) (no statute of limitations under Ohio antitrust law).

⁴⁷ See *infra* notes 78-204 and accompanying text.

⁴⁸ See *Beltone Electronics Corp. v. Selbst*, 1977-2 Trade Cas. (CCH) ¶ 61,586 (N.Y. Sup. Ct. Aug. 17, 1977) at 72,387, *aff'd mem.*, 61 A.D.2d 966, 403 N.Y.S.2d 1019 (1978); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 82 (E.D.N.Y. 1980). See *State v. Lawn King, Inc.*, 150 N.J. Super. 204, 218-19, 375 A.2d 295, 302-03 (N.J. Super. Ct. Law Div. 1977), *rev'd on other grounds*, 169 N.J. Super. 346, 404 A.2d 1215 (N.J. Super. App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980), holding that anything affecting interstate commerce so as to be within jurisdiction of the Sherman Act is beyond the constitutional reach of the state antitrust statute. For a general critique of commerce clause limitations on state regulatory power, see *Eule, Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

⁴⁹ *Hughes v. Oklahoma*, 41 U.S. 322, 331-32 (1979); *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429, 441-44 (1978) (both cases citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-5 to -13 (1978).

that Congress actively regulates, state regulation might be preempted by a federal statute under the supremacy clause.⁵⁰ Third, Congress has the authority to give the states broad power to regulate interstate commerce. For example, the McCarran-Ferguson Act⁵¹ permits the states to regulate interstate aspects of the insurance industry that they would not have power to regulate absent federal authorization. The statute allows states to levy discriminatory state insurance taxes that fall more heavily on out of state companies than on local companies.⁵² Such a statute would certainly fall under the commerce clause were it not for the federal enabling legislation.⁵³ Under the statute, however, state power to regulate is plenary. In fact, the Supreme Court concluded that "if Congress ordains that the states may freely regulate an aspect of interstate commerce, any action taken by a state within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."⁵⁴

In passing the antitrust laws Congress intended to permit states to have their own antitrust legislation and enforcement.⁵⁵ However, the federal antitrust laws do not do for antitrust what the McCarran-Ferguson Act does for insurance. They do not provide that antitrust regulation is the exclusive domain of the states; on the contrary, they create a vast federal network of antitrust enforcement which coexists with state antitrust law.

However, the existence of federal antitrust legislation creates a difficult problem in determining the proper scope of state power. As a matter of history, applications of state antitrust laws to situations "in or affecting" interstate commerce have rarely been condemned and nearly all cases that did condemn such applications were decided before 1935, when judges had a much more restrictive view of the power of the states to regulate in interstate commerce, or to exercise their jurisdiction over persons outside the state.⁵⁶ The Supreme Court has upheld applications of

⁵⁰ *Edgar v. Mite Corp.*, 457 U.S. 624, 630 (1982); *Campbell v. Hussey*, 368 U.S. 297, 301-02 (1961). *See Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954). *But see, Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128-29 (1978). *See generally* L. TRIBE, *supra* note 49, at §§ 6-23 to -26.

⁵¹ 15 U.S.C. §§ 1011-1012 (1976).

⁵² *See Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946).

⁵³ *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977). *See generally* L. TRIBE, *supra* note 49, at § 6-16.

⁵⁴ *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

⁵⁵ *See supra* notes 13-18 and accompanying text.

⁵⁶ Nearly all cases condemning such applications were decided before 1935, when judges viewed the states' power to regulate interstate commerce as more restrictive. *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242 (8th Cir. 1906); *In re Grice*, 79 F. 627 (N.D. Tex. 1897), *rev'd on other grounds sub nom. Baker v. Grice*, 169 U.S. 284 (1898); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890); *J.R. Watkins Medical Co. v. Holloway*, 182 Mo. App. 140, 168 S.W. 290 (1914). *But see Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910).

state antitrust laws where significant interstate commerce or extraterritorial activity is involved, generally on the theory that the state antitrust law was consistent with federal policy. For example, in *Standard Oil Co. of Kentucky v. Tennessee*,⁵⁷ the Supreme Court upheld the application of Tennessee antitrust law to the activities of a Kentucky corporation which had conspired with Tennessee retailers, resulting in higher oil prices in Tennessee.

No modern court, however, has ruled that state antitrust statutes can be applied to interstate commerce without limit.⁵⁸ Some courts have suggested as a standard for such a limit that a state should not have the power to condemn activities that have no injurious effect within the state itself.⁵⁹ Although this standard may reflect sound policy, it is more a general description of the legislative jurisdiction of the state than of its power under the commerce clause. Not even Congress could give a state the power to apply its laws in violation of the due process clause.⁶⁰ When the due process clause or the full faith and credit clause is applied to a state's use of its law to a particular transaction, one must look at the state's interest sought to be protected. That interest is measured in part

⁵⁷ 217 U.S. 413 (1910); see also *Givoney v. Empire Storage & Ice*, 336 U.S. 490, 502 (1949); *Rahl, Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753, 760-63 (1961).

⁵⁸ One Second Circuit opinion, however, doubts that there are such limits: "Our difficulty lies in determining to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce." *Flood v. Kuhn*, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd on other grounds*, 407 U.S. 258 (1972). One might assume that a state could not pass an antitrust law that discriminated against out-of-state businesses—that is, that congressional permission with respect to state antitrust does not go as far as congressional permission with respect to state regulation of insurance. But see *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125-27 (1978). For the remarkably different treatment accorded to state securities legislation, see *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) in which a badly divided Supreme Court held that an Illinois takeover statute that applied to out-of-state companies was unconstitutional under the commerce clause. The Supreme Court stressed the fact that the statute at issue had substantial extraterritorial effects and that the burdens of the statute imposed on interstate commerce were excessive compared to the interests of the state. *Id.* at 643-47.

⁵⁹ See, e.g., *Leader Theatre Corp. v. Randforce Amusement Corp.*, 186 Misc. 280, 283, 58 N.Y.S.2d 304, 307 (Sup. Ct. 1945), *aff'd*, 273 App. Div. 844, 76 N.Y.S.2d 846 (1948). "It is now well established that states . . . can enact and implement legislation which affects interstate commerce, when such commerce has significant local consequences." This rule was applied to preclude jurisdiction when the conspiracy was formulated within the forum state, whose law was being applied, but the consequences were entirely in another state: *Baker v. Walter Reade Theatres, Inc.*, 37 Misc. 2d 172, 237 N.Y.S.2d 795 (1962).

⁶⁰ However, federal constitutional limits on a state's power to apply its law to an out of state transaction are not substantial. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); E. SCOLES & P. HAY, CONFLICT OF LAWS 87-89 (1982); see generally Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 448 (1982) (suggesting that there are "no limits whatsoever on the choice of an interested State's law"); Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C.D. L. REV. 907 (1981); Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889 (1981); Martin, *supra* note 33.

by examining the effect that the transaction had within the state or upon the people whom the state protects.⁶¹

The commerce clause, however, generally imposes a different kind of limitation on state power. The doctrine of legislative jurisdiction is designed to keep one state from encroaching upon the sovereignty of another state and to ensure that people are not treated unfairly by states with which they have minimal contacts.⁶² The commerce clause issue in state antitrust litigation, however, is not often the sovereignty of one state vis-à-vis the sovereignty of another, nor is it the relationship to the injury felt within the state. The issue is the authority of a state to apply its law to a transaction in the face of a conflicting federal interest.⁶³

Resolution of the commerce clause issue should not focus on extraterritoriality but on the preservation of a unified, mutually reinforcing, two level antitrust enforcement scheme. The concept of sovereignty based on interest or territoriality that influences state choice-of-law doctrine is simply unable to accommodate antitrust injuries that are not confined within state boundaries. Theoretically, every price-fixing conspiracy in the United States injures everyone in the United States.⁶⁴ Most extraterritorial applications of state antitrust law recognize only what is obvious: that a price-fixing conspiracy in Florida can hurt Californians just as much as a price-fixing conspiracy in California.⁶⁵ In fact, most assertions of state antitrust authority which conflicts with assertions of federal antitrust authority lie in areas where the effect of the violation in the forum state is obvious and is not an issue in the case.⁶⁶

Conflicts between states as sovereigns are generally horizontal and are often closely related to geography and to physical territoriality. When a state court seeks to reach persons or transactions outside the state, it balances the right of the forum state to protect people or property within its territory against the competing rights of other states to do the same and the right of people from other states to be treated fairly.⁶⁷ Although questions of personal jurisdiction and choice of law often raise federal issues under the due process clause or the full faith and credit clause, the conflicts are not between the federal and the state govern-

⁶¹ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981) (Powell, J., dissenting). See also Reese, *Legislative Jurisdiction*, *supra* note 7, at 1602.

⁶² See discussion *infra* notes 77-153 and accompanying text.

⁶³ See *infra* notes 154-76 and accompanying text.

⁶⁴ See *St. Joe Paper v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1982).

⁶⁵ *Id.*

⁶⁶ See, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), *reh'g denied*, 439 U.S. 884 (1978); *Three J Farms Inc. v. Plaintiff's Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *California v. California and Hawaiian Sugar Co.*, 588 F.2d 1270 (9th Cir. 1978), *cert. denied*, 456 U.S. 998 (1982).

⁶⁷ But see Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 799-800 (1983) (criticizing modern interest analysis); Ely, *supra* note 33 (same).

ment. The conflicts occur between states or between one state and the citizens of a different state. In these cases of competing sovereigns, it makes sense to examine the relationship between a state and a particular transaction by looking at the effects of the transaction within the forum state.

Conflicts between state and federal authority, on the other hand, are generally vertical. Although they are occasionally resolved by reference to geography,⁶⁸ the geographical reach of the Sherman Act and of state antitrust law in fact overlap almost to the point of congruity.⁶⁹ Although the interest of a particular state may be weaker when it seeks to apply its law to an out-of-state activity, the interest of the federal government under those circumstances is not necessarily stronger unless the assertion of state authority violates the Constitution.⁷⁰

Federal antitrust law today applies to real estate brokers, agricultural products located completely within a single state, and even hospital services.⁷¹ The result of this expansive reach is that the overwhelming majority of assertions of state antitrust are in areas within the reach of federal antitrust law as well. In other words, the classification of restraints as purely intrastate and thus within the exclusive jurisdiction of state antitrust, or interstate and thus within the exclusive domain of federal law has long since passed. The vitality of this distinction is the exception rather than the rule.⁷²

The demise of the interstate-intrastate distinction forces the issue of state antitrust power under the commerce clause back to the question of preemption. Preemption is in turn a question of congressional intent and not of constitutional interpretation. However, the congressional intent of the Sherman Act's framers in the late nineteenth century is inappropriate to the modern situation.⁷³ Since the Supreme Court has held in a long line of cases that preemption is not to be presumed or inferred,⁷⁴ and because Congress clearly intended that state antitrust law *not* be

⁶⁸ See, e.g., *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982) (restraint described as "local" and thus outside the reach of federal antitrust laws).

⁶⁹ See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980) (finding interstate commerce under Sherman Act in case of price-fixing in one state and effects in another).

⁷⁰ Congress of course has the power to use federal antitrust laws to preempt most extraterritorial applications of state antitrust law, but it has chosen not to exercise that power.

⁷¹ See *McLain*, *supra* note 69; see also *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); but see *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Medical Center*, 42 ANTITRUST & TRADE REG. REP. (BNA) 623 (E.D. Pa. Mar. 15, 1982).

⁷² But see *State v. Lawn King*, 150 N.J. Super. 204, 218-19, 375 A.2d 295, 301 (N.J. Super. Ct. Law Div. 1977), *rev'd on other grounds*, 169 N.J. Super. 346, 404 A.2d 1215 (N.J. Super. Ct. App. Div. 1979), *aff'd*, 84 N.J. 179, 417 A.2d 1025 (1980).

⁷³ See sources and cases cited *supra* notes 12-17 and accompanying text.

⁷⁴ See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130-31 (1978), *reh'g denied*, 439 U.S. 884 (1978).

preempted as a general matter,⁷⁵ there are virtually no operative limits on the reach of state antitrust law under the commerce clause.⁷⁶

Legislative Jurisdiction and Choice of Law

Legislative jurisdiction is the power of a state to apply its law to a particular transaction.⁷⁷ It should be distinguished from judicial jurisdiction which is the power of a state to try a case in its courts.⁷⁸ The term legislative jurisdiction is most often used to describe the constitutional power of a state to apply its law to a transaction or event that occurred outside the geographic territory of the state.⁷⁹ Similarly, one of the most important elements of the doctrine of judicial jurisdiction is personal jurisdiction, or the power of a court to summon before it a person who is not within the territory of the sovereign that created the court.⁸⁰

Although legislative jurisdiction is at the heart of choice-of-law doctrine, the concept of choice of law is broader than the concept of legislative jurisdiction. In most conflicts cases, choice of law is governed not by constitutional limits on state power, but by considerations of comity or public policy that frequently encourage a state court not to apply its own law to a transaction even though it would have the constitutional power to do so.⁸¹ On the other hand, the tendency of state legislatures and courts is to go to the full constitutional limit of their powers when they are asserting personal jurisdiction.⁸²

⁷⁵ See sources and cases cited *supra* notes 13-18 and accompanying text.

⁷⁶ In no case since the 1940's has a federal court held that a state antitrust statute is unconstitutional under the federal Constitution because it exceeds state power under the commerce clause. One should distinguish cases where, as a matter of state law, a state statute was held inapplicable to a certain activity outside the state or in interstate commerce. Federal preemption of state antitrust laws has been found occasionally, but the basis for preemption was not federal antitrust law, but some other federal statute, such as the National Labor Relations Act. See sources and cases cited *infra* at note 172. When state antitrust laws are alleged to be in direct conflict with federal antitrust law, the courts have found them not to be so in spite of important substantive differences between the two bodies of law. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 129-32 (1978); *Shell Oil v. Younger*, 587 F.2d 34 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

At least one state legislature has taken explicit advantage of the broad scope of state antitrust power under the commerce clause. See the Florida Antitrust Act of 1980, FLA. STAT. ANN. § 542.31 (West Supp. 1982):

No action under this chapter shall be barred on the grounds that the activity or conduct complained of in any way affects or involves interstate or foreign commerce. It is the intent of the Legislature to exercise its power to the fullest extent consistent with the Constitutions of this state and the United States.

⁷⁷ See generally R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 495-547 (2nd ed. 1980); Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133 (1981); Reese *supra* note 7.

⁷⁸ See generally RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 24-79 (1971); Reese, *supra* note 7.

⁷⁹ See generally R. WEINTRAUB, *supra* note 77, at 495-547; Reese, *supra* note 7.

⁸⁰ See generally R. WEINTRAUB, *supra* note 77, at 90-185.

⁸¹ See Martin, *supra* note 33, at 202.

⁸² See R. WEINTRAUB, *supra* note 77, at 152.

One reason that state courts more frequently stretch personal jurisdiction to its constitutional limit than they do legislative jurisdiction is that today constitutional limits on personal jurisdiction are more severe than the constitutional limits on legislative jurisdiction. A series of recent United States Supreme Court cases has further widened this gap.⁸³

In a well developed line of cases beginning in the 1940's⁸⁴ the Supreme Court required that in order for a state court to assert its authority over someone outside the state, that person must have certain "minimum contacts" with the state.⁸⁵ These contacts must be sufficient to show that the defendant has somehow "personally availed" himself of the privilege of conducting business or other affairs within the forum state.⁸⁶ Furthermore, the defendant's contacts with the forum state must be sufficiently direct that the defendant could reasonably foresee a lawsuit in the forum state.⁸⁷

In spite of a recent Supreme Court opinion,⁸⁸ the limits of state power in applying its own law to a transaction that occurs outside the state are less clearly articulated than is state court personal jurisdiction. In *Allstate Insurance Company v. Hague*,⁸⁹ the Supreme Court upheld the power of Minnesota to apply its insurance law to an accident that occurred in Wisconsin. Both the accident victim and the claimant (the victim's wife) were domiciled in Wisconsin and the deceased had purchased the insurance policy there. Although these facts suggested that application of Wisconsin law would be far more sensible,⁹⁰ the United States Supreme

⁸³ Recent Supreme Court decisions limiting the power of states to exercise personal jurisdiction include: *Ins. Co. of Ireland, Ltd. v. Compagnie des Bauxite Guinee* 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977). A recent Supreme Court case confirming broader powers of a state to apply its law to an out-of-state transaction is *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). For an analysis and critique of this apparent divergence, see Hill, *supra* note 60. The Supreme Court itself recognized this divergence in *Kulko*, 436 U.S. at 98, where it suggested that although there was no personal jurisdiction in California over the out of state defendant, California law might "arguably" apply to the cause of action. As recently as two decades ago, this divergence was not apparent, and some scholars believed that the limits of state personal and legislative jurisdiction were converging. See Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282 (1960).

The constitutional limits of state personal jurisdiction and of state legislative jurisdiction both are governed by the fourteenth amendment due process clause, although in many cases the full faith and credit clause acts as an additional limitation on state assertions of legislative jurisdiction. See R. WEINTRAUB, *supra* note 77, at 517-42. However, today it appears that the standard for constitutional limitations on state choice of law is virtually the same, regardless of which clause of the Constitution it is analyzed under. See *Allstate Ins. Co.*, 449 U.S. at 308 n.10. See generally Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981).

⁸⁴ E.g., *International Shoe v. Washington*, 326 U.S. 310 (1945).

⁸⁵ *International Shoe*, 326 U.S. at 316.

⁸⁶ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁸⁷ *World-Wide Volkswagen*, 444 U.S. at 297.

⁸⁸ *Allstate Ins. Co.*, 449 U.S. 302.

⁸⁹ *Id.*

⁹⁰ See *id.* at 324 (Stevens, J., concurring); Weintraub, *Who's Afraid of Constitutional Limita-*

Court held that the Minnesota law could be applied for three reasons: the decedent was a member of the Minnesota work force and commuted daily across state lines;⁹¹ the defendant insurance company was present and doing business in Minnesota;⁹² and the claimant moved to Minnesota after the accident but before she initiated the lawsuit.⁹³ The court thus concluded that there was a sufficient "aggregation of contacts" between the forum state, the parties, and the occurrence to create state interests supporting the application of Minnesota law.⁹⁴ This outcome is at least verbally consistent with the well established rule that a state may apply its law to an activity outside the state if the state has a legitimate interest based on a "sufficiently substantial contact with the activity in question"⁹⁵ The *Allstate Co.* Court did not provide much guidance, however, as to the definition of a "sufficiently substantial contact."⁹⁶

Questions of legislative jurisdiction have not often played a significant role in state antitrust adjudication, largely because plaintiffs have generally had well developed interests within the forum state.⁹⁷ Where the issue has arisen, the courts have dealt with it as a question of state power under the commerce clause⁹⁸ and not as a question of state power to legislate outside its territory under the due process clause. Nevertheless, concepts of legislative jurisdiction can and ought to play a role in determining the outer limits of state antitrust law in a federal system. These concepts are particularly important when the antitrust law of a particular state is broader in its scope of liability than federal antitrust law is, and when that broader liability is likely to drag within its net people whose contact with the state is minimal.

tions on Choice of Law? 10 HOFSTRA L. REV. 17, 24 (1981).

⁹¹ However, the accident did not occur while the deceased was commuting to work. *Allstate Ins. Co.*, 449 U.S. at 314.

⁹² *Id.* at 317.

⁹³ *Id.* at 318.

⁹⁴ *Id.* at 320.

⁹⁵ *Richards v. United States*, 369 U.S. 1, 15 (1962). What that contact must be, and how substantial it must be, remains unclear.

⁹⁶ Apparently, however, the state may apply its own law to a defendant if the defendant is "present and doing business" within the state. In assessing this "present and doing business" requirement, the Supreme Court in *Allstate Insurance* explicitly suggested that the "doing business" requirement to support a state's choice of law against an out-of-state defendant is less than the "doing business" requirement necessary to support the state's assertion of personal jurisdiction over the defendant. Thus it would appear that any time an out-of-state defendant is "doing business" within a state sufficiently to support the state court's assertion of personal jurisdiction, it is also doing a sufficient amount of business to support the application of the state's law. See *Allstate Ins. Co.*, 449 U.S. at 317 n.23. See generally Sedler, *supra* note 83.

⁹⁷ But see *Baker v. Walter Reade Theatres, Inc.*, 37 Misc. 2d 172, 173, 237 N.Y.S.2d 795, 796 (1962) (holding that the defendant's activities had no "significant local consequences").

⁹⁸ See, e.g., *St. Joe Paper Co. v. Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1982); *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974).

*St. Joe Paper v. Superior Court*⁹⁹ illustrates the nature of this problem. At issue was the validity of service of process on several paper companies allegedly involved in a giant corrugated paper price-fixing conspiracy. The plaintiffs were indirect purchasers from California and brought their action under the Cartwright Act, California's state antitrust law which expressly permits indirect purchasers to sue for treble damages.¹⁰⁰ The defendants were from Michigan and Florida and had sold their products to distributors located outside California and who themselves were not part of the conspiracy. The distributors in turn sold the products to the California plaintiffs and delivered them there. All parts of the alleged conspiracy were formulated and performed outside California. Although the defendants did not sell their products within California, they knew that some of their products were being resold into California markets.¹⁰¹

The California Court of Appeal held that the trial court had properly obtained personal jurisdiction¹⁰² over the defendants for several reasons. First, the defendants had committed a tortious act outside the state of California which had foreseeable effects within the state.¹⁰³ The Court distinguished *World-Wide Volkswagen v. Woodson*¹⁰⁴ by noting that in *St. Joe Paper* the "foreseeability" at issue was not the mere likelihood that the paper companies' products would enter California, but rather the certain knowledge that some of the paper being manufactured was to be sold to California purchasers.¹⁰⁵ The defendants "admittedly elected to indirectly serve the market in California . . ."¹⁰⁶ Furthermore, the court observed that the cause of action arose out of the above-described forum-related activity.¹⁰⁷

St. Joe Paper raises an interesting policy issue that was not addressed by the court. That issue is not the court's personal jurisdiction over the defendants, but rather the state's legislative jurisdiction to condemn price-fixing in remote parts of the country. That issue is made more difficult because the plaintiffs were indirect purchasers. Although under federal

⁹⁹ 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1981).

¹⁰⁰ Act of Aug. 24, 1978, ch. 536, 1978 Cal. Stat. 1693 which provides, in part, that a treble damages action may be brought "by any person who is injured in his business or property by reason of anything forbidden . . . by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant" (codified as amended at CAL. BUS. & PROF. CODE § 16759(a) (West Supp. 1981)).

¹⁰¹ *St. Joe Paper*, 120 Cal. App. 3d at 994-95, 175 Cal. Rptr. at 95-96. One of the defendants, Consolidated Packing Corp., had made one unsolicited sale in California directly to a California wholesale customer. However, that customer was not a party in the case.

¹⁰² California has a very expansive long-arm statute: "A Court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIVIL CODE § 410.10 (1970).

¹⁰³ *St. Joe Paper*, 120 Cal. App. 3d at 997, 175 Cal. Rptr. at 97.

¹⁰⁴ 444 U.S. 286 (1980). See *supra* note 87 and accompanying text.

¹⁰⁵ *St. Joe Paper*, 120 Cal. App. 3d at 998-99, 175 Cal. Rptr. at 99.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1000, 175 Cal. Rptr. at 99.

law an indirect purchaser cannot pursue an action for damages,¹⁰⁸ it is widely conceded that indirect purchasers two or three times removed in the market from the conspirators can suffer injury as a result of price-fixing.¹⁰⁹ In other words, a rule that an indirect purchaser in California could use the California antitrust law to reach a conspiracy elsewhere when the defendants have made no direct sales into California would give the state legislature the power to condemn antitrust violations nationwide; as a result, the Cartwright Act would then reach as far as the Sherman Act.¹¹⁰

Under current choice-of-law doctrine, California probably does have a sufficient interest in the cause of action in *St. Joe Paper* to support the application of its own law.¹¹¹ Like the federal Clayton Act, California's Cartwright Act provides that "any person who is injured in his business or property by reason of anything forbidden" by the state antitrust laws may recover treble damages for injuries sustained.¹¹² California's interest in protecting injuries to the business or property of its own citizens is certainly appropriate under current choice-of-law analysis; indeed, it appears to be substantially greater than the interest required by the Supreme Court in *Allstate Ins. Co. v. Hague*.¹¹³

¹⁰⁸ *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

¹⁰⁹ See Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979); Landes & Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980).

¹¹⁰ As a federal court observed in 1897, when considering an analogous provision of a Texas antitrust statute, such a rule would make it "unnecessary for any other state or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated . . . according to the wishes of the legislature of Texas. . . ." *In re Grice*, 79 F. 627, 639 (N.D. Tex. 1897), *rev'd on other grounds sub nom. Baker v. Grice*, 169 U.S. 284 (1894); see also Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints After Allstate Ins. Co. v. Hague*, 10 HOFSTRA L. REV. 103 (1981).

In the great majority of cases raising the issue, federal courts applying federal antitrust law base personal jurisdiction on the forum state's long-arm statute. If the defendant is a corporation, its contacts may be "aggregated" across the country as a whole under § 12 of the Clayton Act, 15 U.S.C. § 22 (1976). See, e.g., *Black v. Acme Markets, Inc.*, 564 F.2d 681 (5th Cir. 1977). Aggregate contracts have not often been used, however, to justify an assertion of jurisdiction over a defendant who did not have sufficient contacts with the forum state to permit use of the state's long-arm statute. See generally Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485 (1982).

Since the federal court usually bases federal antitrust jurisdiction on the state's long-arm statute, and since state power to apply its law is generally broader than state adjudicatory power over a defendant located elsewhere, it would appear that the jurisdictional reach of a state antitrust law could be just as broad as the jurisdictional reach of federal law from a federal court located in the same state.

¹¹¹ Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). See *supra* notes 88-95 and accompanying text.

¹¹² See sources cited *supra* note 100.

¹¹³ See *supra* notes 88-95 and accompanying text.

Nevertheless, the extraterritorial application of state antitrust law in *St. Joe Paper* can be offensive to the two-tier, federal-state antitrust enforcement mechanism. The limitation of certain damage actions to direct purchasers reflects a federal policy of avoiding multiple recovery against defendants. Absent this limitation, a defendant could be liable once to direct purchasers for the full injury sustained, and a second time to indirect purchasers further down the distribution chain.¹¹⁴ This federal policy might not be noticeably impaired by a half dozen state antitrust statutes¹¹⁵ that give indirect purchasers damage actions, provided that the application of such laws is restricted to defendants or activities located within the state. However, under current case law, California can apply its indirect-purchaser rule to almost any defendant in the nation over whom it can obtain personal jurisdiction, if the plaintiff's business or property has been injured.¹¹⁶

Conversely, state antitrust laws are an important part of our antitrust enforcement scheme. Furthermore, the doctrine that states can condemn activity elsewhere which injures its citizens at home is a well established and essential part of the jurisprudence of federalism.¹¹⁷ Equally important to federalism is the principle that state antitrust laws may sometimes be different from federal antitrust laws in their scope of liability or in the protection they create. Congress has not declared that state antitrust laws are legitimate only when they are identical with federal law.¹¹⁸ The doctrine of federal supremacy applies only when an assertion of state power substantially frustrates the policies of the federal antitrust system.¹¹⁹

R.E. Spriggs v. Adolph Coors Co.,¹²⁰ illustrates a less problematic extraterritorial application of state antitrust law. Coors manufactured its beer in Colorado, and sold it F.O.B. Golden, Colorado, to various wholesale distributors in the western United States. Coors itself was not present in California, but the written distribution agreements between Coors and its distributors designated exclusive territories within which each

¹¹⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. at 730.

¹¹⁵ See sources cited *supra* note 11.

¹¹⁶ See cases cited *supra* notes 102-07 and accompanying text. The purchase of an article within the forum state at an excessive price, even by a consumer, is an injury to business or property. See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). It is also an event that takes place within the forum state justifying application of the forum state's law under both traditional and modern choice-of-law rules. See Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 142-43 (1981). In short, any price-fixing conspiracy anywhere in the United States or the world could yield a state antitrust action by an indirect purchaser consumer who purchased the product in California, provided that the California court could obtain personal jurisdiction.

¹¹⁷ See generally R. WEINTRAUB, *supra* note 77, at 495-547.

¹¹⁸ See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133-34 (1978).

¹¹⁹ *Id.* at 132.

¹²⁰ 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974).

distributor could resell its beer. The plaintiff brought suit alleging that these vertically-imposed territorial divisions were illegal in California under the Cartwright Act.¹²¹

In holding that the activity could be reached under the Cartwright Act, the California court noted that "the activity complained of has a factual nexus solely within the State of California,"¹²² because the territorial division mechanism explicitly controlled the plaintiff's operations within California. By specific contract provisions, the defendant aimed its anti-competitive activity directly at the California resale market.¹²³

The effects of price-fixing, unlike the activity in *R.E. Spriggs* are more promiscuous. When a cartel is organized in Florida to fix the prices of paper boxes, the members of the conspiracy may presume that their product will find its way into every state. However, this knowledge is somewhat akin to the knowledge of a New England car dealer that one of the automobiles it sells may eventually find its way into Oklahoma.¹²⁴ As long as the defendant has not in some way targeted California for its marketing activities, the threat of state overextension becomes substantially more serious in price-fixing cases where the state has granted damage actions to indirect purchasers. The issue in such a case is not the reach of the antitrust laws under the commerce clause—the amount of interstate commerce is not less because the purchaser is indirect—but rather the legislative power of California to condemn activity occurring outside the state under such circumstances.¹²⁵

¹²¹ The Cartwright Act imposed the same test for liability in vertical territorial division cases as the Sherman Act. At the time the action was brought, vertical territorial division was a per se violation of the Sherman Act. *U.S. v. Arnold, Schwinn & Co.*, 338 U.S. 365 (1967). However, subsequently *Schwinn* was overruled by the United States Supreme Court, and a rule of reason was applied to vertical territorial division. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In a subsequent appeal of the *Coors* case concerning a different issue, the appellate court adopted the rule of reason interpretation of the Cartwright Act as well. *R.E. Spriggs Co. v. Adolph Coors Co.*, 95 Cal. App. 3d 419, 428, 156 Cal. Rptr. 738 (1979).

¹²² *R.E. Spriggs*, 37 Cal. App. 3d at 665, 112 Cal. Rptr. at 593.

¹²³ Presumably, if a plaintiff from Oregon was complaining about the Colorado defendant's territorial division imposed upon it in Oregon, California would not apply its law. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). However, in such a case the amount of interstate commerce involved would be the same as it would be with respect to territorial divisions in California. The illustration suggests that although the California court in *Spriggs v. Coors* treated the issue before it as one of state antitrust power under the commerce clause, the issue should more properly have been considered as one of choice-of-law.

¹²⁴ See *World-Wide Volkswagen*, 444 U.S. 286 (1980).

¹²⁵ If the current interpretation of the "aggregate contacts" test in *Black v. Acme Markets, Inc.*, 564 F.2d 681 (5th Cir. 1977) is correct, then a corporate defendant who violated the federal antitrust laws anywhere in the United States would be within the jurisdictional reach of any federal court in the United States, provided it was served with process under 15 U.S.C. § 22 (1976). However, the federal venue statutes would still give such a defendant substantial protection: it could be sued only in a district in which it was actually present or doing business. See Hovenkamp, *Personal Jurisdiction and Venue in Private*

Two suggestions have been made that would put more distinct limits on California's ability to condemn out-of-state violations of its antitrust laws. The first is that a state should not be permitted to apply its law to an out of state transaction unless the court has *specific* personal jurisdiction over the defendant, that is, personal jurisdiction based on contacts with the forum state that are related to the cause of action.¹²⁶ The second suggestion is that the standards for assertions of legislative jurisdiction be more restrictive so that they conform more to the current constitutional standards for state court assertions of personal jurisdiction.¹²⁷ Neither test has been adopted as a due process standard, although several members of the Supreme Court appear to be searching for stricter limits on state choice-of-law decisions.¹²⁸

In his concurring opinion in *Allstate*, Justice Stevens argued that due process considerations of state choice-of-law decisions ought to focus on fairness to the litigants.¹²⁹ A choice-of-law decision is unfair, argued Justice Stevens, when the defendant could not reasonably anticipate that it would be subjected to the law of a particular state.¹³⁰ In that case Justice Stevens concluded, however, that *Allstate* "was aware that it could be sued in the Minnesota courts."¹³¹ Furthermore, since state courts are inclined to apply their own law in questionable situations, *Allstate* could also reasonably anticipate that if it were sued in a Minnesota court it would be held accountable under Minnesota law. Under this analysis, Justice Stevens reasoned that the nature of the insurance policy, which provided

Antitrust Actions in the Federal Courts: A Policy Analysis, 67 IOWA L. REV. 485, 507-21 (1982). The state laws provide no such protection. If the state court could constitutionally obtain service of process although all defendants resided outside the state, in most states venue would be appropriate somewhere in the state. For example, California provides that if all defendants reside outside the state, the plaintiff has its choice of venue. See CAL. CIV. PROC. CODE § 395 (1972); *Hamilton v. Superior Court*, 37 Cal. App. 3d 418, 112 Cal. Rptr. 450 (1974). The new Florida Antitrust Act of 1980 provides for venue in the county "in which the cause of action arose, in which any defendant resides, is found, or has an agent or in which any act in furtherance of the conduct prohibited . . . occurred." FLA. STAT. ANN. § 542.30 (West Supp. 1982).

¹²⁶ See von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 311-12 (1983); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

¹²⁷ See Hill, *supra* note 60. A third suggestion has been made: the creation of national choice-of-law rules, either by federal statute or else by federal common law. See Shreve, *In Search of a Choice of Law Reviewing Standard—Reflections on Allstate Ins. Co. v. Hague*, 66 MINN. L. REV. 327, 337-45 (1982).

¹²⁸ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). The opinion of the Court was signed only by Justices Brennan, White, Marshall, and Blackmun. Justice Stevens concurred. Justices Powell and Rehnquist and the Chief Justice dissented. Justice Stewart did not participate.

¹²⁹ *Allstate*, 449 U.S. at 326 (Stevens, J., concurring).

¹³⁰ "[The] desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process clause." *Id.* at 327 (Stevens, J., concurring). See also R. WEINTRAUB, *supra* note 77, at 26-33.

¹³¹ *Allstate*, 449 U.S. at 330.

nationwide coverage, and the fact that Allstate was doing business in Minnesota, were dispositive: Allstate could anticipate a lawsuit in Minnesota.¹³²

Justice Stevens' test for choice-of-law is remarkably similar to the test for personal jurisdiction created by the court in *World-Wide Volkswagen v. Woodson*¹³³; in fact, it appears to make personal jurisdiction a prerequisite for legislative jurisdiction.¹³⁴ However, Justice Stevens does not go as far as Professor Martin, who requires that before a state can assert legislative jurisdiction it must have personal jurisdiction based on contacts related to the cause of action.¹³⁵

Justice Powell's dissent in *Allstate* would assess a requirement of certain "significant contacts between the State and the litigation."¹³⁶ In developing this test, Justice Powell articulated two principles. First, the relationship between the forum state and the subject matter of the litigation must be sufficiently great so that the defendant "must have known it might be sued" in the forum state.¹³⁷ Second, the state "must have a legitimate interest in the outcome of the litigation before it."¹³⁸ Justice Powell concluded that the application of Minnesota law in the Allstate case passed the first test: "no reasonable expectations of the parties were frustrated."¹³⁹ The application failed the second test, however, because the application of Minnesota's law would not further any legitimate state interest. "The forum state has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State."¹⁴⁰ In this case Minnesota's application of its law amounted to an attempt to regulate Allstate's insurance activities in Wisconsin. The fact that Allstate also did business (unrelated to the cause of action) in Wisconsin, the fact that the decedent worked in the forum state, and the fact that the plaintiff subsequently moved there were irrelevant to the question of Minnesota's interest.¹⁴¹ Justice Powell's dissenting opinion thus comes close to requiring that a state cannot apply its law to a transaction unless it has specific personal jurisdiction over the defendant.

The legislative jurisdiction problem confronting the California court in *St. Joe Paper*¹⁴² is different, however, from the choice-of-law problem

¹³² *Id.*

¹³³ 444 U.S. 286 (1980).

¹³⁴ However, the opinion of the Court specifically rejected the notion that personal jurisdiction in a state is a prerequisite for application of the law of that state. *Allstate Ins. Co.*, 449 U.S. at 317 n.23.

¹³⁵ Martin, *supra* note 126.

¹³⁶ *Allstate Ins. Co.*, 449 U.S. at 332.

¹³⁷ *Id.* at 333.

¹³⁸ *Id.* at 334.

¹³⁹ *Id.* at 336.

¹⁴⁰ *Id.* at 338.

¹⁴¹ To be sure, "Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest." *Id.* at 339.

¹⁴² See *supra* notes 99-119 and accompanying text.

presented by *Allstate Ins. Co. v. Hague*. In *Allstate* the choice was between the law of Minnesota or the law of Wisconsin. If in a state antitrust case such as *St. Joe Paper*, the issue is whether the law to be applied is California's (where the plaintiff does business and the action was filed) or Florida's (where the defendant's business is located), the choice is easy: if California has a legitimate policy interest in protecting its citizens from antitrust violations, even if the injured persons are indirect purchasers, then California's interest will not be defeated by an inconsistent requirement under the Florida antitrust law.¹⁴³ In *St. Joe Paper*, however, the conflict would not be between the antitrust laws of two different states; it would instead revolve around the authority of California to apply its law to activities in Florida in the face of an inconsistent federal policy.

The question then becomes somewhat different: given the pervasive system of federal antitrust regulation, should a price-fixer in Florida be expected to answer to the antitrust law of a state with which it does no business under circumstances that are inconsistent with federal antitrust policy? The only answer that will protect the integrity and superiority of the federal antitrust enforcement mechanism seems to be "no." On the other hand, a state should be allowed to protect its own interests to the extent that the Constitution and Congress have permitted it to do so. A reasonable position, therefore, is that a state should be permitted to apply its antitrust law to an out-of-state transaction only when the defendant has sufficient contacts *related to the transaction* so as to make the court's assertion of jurisdiction reasonable.¹⁴⁴

The current paradigm of constitutional analysis of state legislative power is not very helpful for determining the proper extraterritorial limits of state antitrust law.¹⁴⁵ Today, state choice-of-law decisions are considered as presenting questions of due process or full faith and credit; states are given a good deal of power to apply their own laws to out-of-state transactions. The only requirements are that the state's interest in the outcome of the litigation be sufficient and that the defendant not be caught completely by surprise.¹⁴⁶ A state's power to apply its law in the face of an inconsistent federal policy, on the other hand, is analyzed under the supremacy clause and the doctrine of preemption.¹⁴⁷ The Supreme Court has made it clear, however, that state antitrust laws are *not* preempted by the federal antitrust laws, even when the extraterritorial effect of the state law is substantial.¹⁴⁸

Choice-of-law analysis proceeds with an examination of the interest of

¹⁴³ Florida Antitrust Act of 1980, FLA. STAT. ANN. § 542.22 (West Supp. 1982).

¹⁴⁴ See generally Martin, *supra* note 126.

¹⁴⁵ See *supra* notes 49-57 and accompanying text.

¹⁴⁶ See Weintraub, *supra* note 90, at 25-33.

¹⁴⁷ See *supra* notes 48-76 and accompanying text.

¹⁴⁸ See *Exxon Corp. v. Governor of Md.*, 437 U.S. 121 (1978) *infra* notes 164-76 and accompanying text.

the state whose law is being applied. In fact, it appears that if the state can assert *any* legitimate interest, application of its law will be upheld provided that the application is not grossly unfair to the defendant.¹⁴⁹

On the other hand, preemption analysis concerns the basic questions of federal power and congressional intent. If Congress has the power to preempt a certain field, and if Congress has intended to do so, the strength of the state's interest is irrelevant.¹⁵⁰ One of the clearest examples of such a paradigm is labor law, where federal law has generally preempted the field in spite of the fact that states have a very strong economic interest in local labor activities.¹⁵¹

The converse of the above argument is that California's decision to grant damage actions to indirect purchasers is irrelevant when the vertical choice-of-law problem of *St. Joe Paper* is considered. If California has the power to give a damages action to indirect purchasers at all, then it has the power to do so when the condemned activity takes place in Florida. Similarly, if the commerce clause permits California to reach a cartel in Florida at all, then it permits California to do so when the plaintiff is an indirect purchaser seeking damages.¹⁵²

There is no evidence that Congress has ever wanted to prohibit ex-

¹⁴⁹ See *Allstate Ins. Co.*, 449 U.S. at 326 (Stevens, J., concurring); *Nevada v. Hall*, 440 U.S. 410 (1979) ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."). See generally Weinberg, *supra* note 60, at 448; R. WEINTRAUB, *supra* note 77, at 517-34.

In fact, even the plaintiff's domicile acquired after the conspiracy occurred might give California a constitutionally recognizable interest in applying its antitrust law. See *Allstate Ins. Co. v. Hague*, 449 U.S. at 319. California courts probably would hold as a matter of state law that the plaintiff's after-acquired domicile is irrelevant to a choice-of-law decision. See *Reich v. Purcell*, 63 Cal. Rptr. 31, 34, 432 P.2d 727, 731 (1967 (per C.J. Traynor)). A rule that based a choice-of-law decision on after-acquired domicile, noted Chief Justice Traynor, would create monstrous forum-shopping problems. *Id.* For a critique of interest analysis in choice of law decision see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1982).

¹⁵⁰ "Where preemption is found, the state enactment must fall without any effort to accommodate the State's purposes or interests." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 61 (1982) (Rehnquist, J., dissenting). The one exception to this rule is when the state's asserted interest is constitutionally protected from federal regulation. For example, the tenth amendment offers such protection in some situations. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). Under the so-called "state action" exemption doctrine, the Supreme Court does recognize that a state's interest in certain kinds of business regulation can create an exemption from federal antitrust regulation. However, this exemption is predicated on the notion that Congress intended that the antitrust laws not encroach too severely on the state's regulatory authority. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Parker v. Brown*, 317 U.S. 341 (1943); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981).

¹⁵¹ See, e.g., *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274 (1971); *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

¹⁵² At least, it permits the state to do so if the state statute is not in direct conflict with the federal statute. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 129-30 (1978); L. TRIBE, *supra* note 49, at 377-84.

trateritorial assertions of state antitrust law.¹⁵³ Nevertheless, extrateritorial applications of state antitrust laws can be quite damaging to the federal antitrust enforcement scheme when the state law is inconsistent with the federal law.

*Extraterritoriality and State Antitrust Law:
The Uneasy Case for Federal Preemption*

It appears from the facts of *St. Joe Paper v. Superior Court*¹⁵⁴ that neither the due process clause nor the full faith and credit clause would bar the application of California's antitrust law, in spite of the fact that the conspiracy took place outside the state and at least one of the defendants made no direct sales in California. California courts have the power to reach outside the state in order to protect legitimate state interests, and California unquestionably has a legitimate interest in protecting its citizens from illegal price-fixing. Furthermore, no court to date has held that a state antitrust statute which provides damages to indirect purchasers is void under the supremacy clause for lack of consistency with federal law.¹⁵⁵

It further appears that the commerce clause does not limit substantially a state's power to apply its antitrust law to an out of state price-fixing conspiracy.¹⁵⁶ This power is particularly important with respect to a state such as California, which not only applies its Cartwright Act to the full extent of its constitutional power, but which has also contravened federal policy by giving indirect purchasers a cause of action for damages. The policy becomes even more problematic considering that the federal law gives remote defendants venue protections¹⁵⁷ that state law may not provide.¹⁵⁸ The ability of a California plaintiff to sue a particular out-of-state defendant under the Cartwright Act is effectively limited only by the power of the California court to obtain personal jurisdiction.

Nevertheless, one qualification might be in order. Many applications of state law to interstate commerce have been upheld under the com-

¹⁵³ In 1890, however, the prevailing opinion was that states lacked the constitutional authority to apply their laws outside their territory. See sources and cases cited *supra* notes 19-27.

¹⁵⁴ 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (1981), *cert. denied*, 445 U.S. 982 (1981) discussed *supra* notes 99-119 and accompanying text.

¹⁵⁵ See generally Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, *supra* note 11. See also Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick*, 62 B.U.L. REV. 1241 (1981) (arguing that *Illinois Brick* does not preempt state indirect purchaser actions).

¹⁵⁶ See *supra* notes 108-54 and accompanying text.

¹⁵⁷ 15 U.S.C. § 22 (1976) provides for venue wherever the corporate defendant is an inhabitant, is found, or transacts business. See Hovenkamp, *supra* note 125.

¹⁵⁸ Under California law, if all defendants are nonresidents, the plaintiff may sue anywhere in the state. See CAL. CIV. PROC. CODE § 395 (West Supp. 1982).

merce clause on the theory that the state was simply pursuing a policy consistent with the general federal policy.¹⁵⁹ However, this qualification might be applied inconsistently; although the general federal policy of condemning price-fixing is absolutely clear, today there is also a clear federal policy against permitting damage actions by indirect purchasers.¹⁶⁰

On the other hand, if state antitrust law in the federal scheme is to mean anything at all, it must mean that the states are entitled to be different from the federal government, certainly with respect to such controversial issues as the indirect purchaser rule.¹⁶¹ Federal preemption liberally invoked is a kind of overkill that is difficult to harmonize with Congress' desire to maintain a two-tier antitrust enforcement system.¹⁶² Holding that *Illinois Brick*¹⁶³ preempts contrary applications of state antitrust law does not mean merely that California's indirect purchasers cannot use the Cartwright Act to reach price-fixing in Florida. It means that they will not be able to reach price-fixing in California either, unless the restraint is so local that it is out of range of Sherman Act preemption.

The Supreme Court thus has been extraordinarily reluctant to find that state antitrust laws have been preempted by federal law. For example, in *Exxon Corp. v. Governor of Maryland*¹⁶⁴ the Supreme Court considered a preemption challenge to a state vertical disintegration statute. The statute provided that no producer or refiner of petroleum products could operate a retail service station in Maryland.¹⁶⁵ No producers or refiners were located within the state, so the burden of the statute fell largely on interests outside the state. In addition, the statute provided that any temporary price reduction extended by a petroleum supplier to one service station in the state must be extended to all stations in the state uniformly.¹⁶⁶

¹⁵⁹ See, e.g., *Standard Oil Co. of Ky. v. Tennessee*, 217 U.S. 413, 422 (1910); cf. *California v. Zook*, 336 U.S. 725, 729 (1949). See also *Parker v. Brown*, 317 U.S. 341 (1943), where the Supreme Court upheld a state program allocating production and marketing of raisins, even though nearly all the raisins were shipped into other states and the California raisins subject to the program included nearly all the raisins consumed in the United States. The Supreme Court held the program valid under the commerce clause because it was consistent with federal policy as manifested in the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-624 (1937). *Parker*, 317 U.S. at 352-58. Furthermore, it was valid under the Sherman Act because the framers of the Sherman Act never intended for the antitrust laws to be used to condemn state regulatory programs that are themselves within the police power of the states and constitutional under the commerce clause. *Parker*, 317 U.S. at 350-52; see also *State v. Allied Chem. & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960); *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (Cal. Ct. App. 1974).

¹⁶⁰ See *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

¹⁶¹ See sources cited *supra* note 155.

¹⁶² See generally *Werden & Balmer, Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1 (1982).

¹⁶³ 431 U.S. 720 (1977).

¹⁶⁴ 437 U.S. 117 (1978).

¹⁶⁵ *Exxon Corp.*, 437 U.S. at 119 (citing MD. ANN. CODE, art. 56, § 157E(b) and (c) (Supp. 1977)).

¹⁶⁶ *Exxon Corp.*, 437 U.S. at 120 (citing MD. ANN. CODE, art. 56, § 157E(a)).

Several vertically-integrated oil companies challenged the statute as being preempted by the Robinson-Patman Act as well as the "general policy of competition"¹⁶⁷ contained in the Sherman Act. The Supreme Court acknowledged that the act was anti-competitive and perhaps inconsistent with federal antitrust policy.¹⁶⁸ It refused, however, to find that any part of the state statute was preempted by federal law. The Court noted that the appellants could not show that compliance with the state law would actually force them to violate the Robinson-Patman Act.¹⁶⁹

In responding to several hypotheticals posed by appellants, the Supreme Court merely noted that "the existence of such potential conflicts is entirely too speculative" to justify preemption.¹⁷⁰ The Court noted that Maryland law condemned certain acts that federal law would permit, but that is the case with respect to most permissible state regulation which is concurrent with federal regulation. Further, the Court said, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states' power to engage in economic regulation would be effectively destroyed."¹⁷¹

It seems clear, today, that the assertion that federal law occupies the field will not be sufficient to preempt state antitrust law.¹⁷² The Supreme

¹⁶⁷ *Id.* at 129.

¹⁶⁸ *Exxon Corp.*, 437 U.S. at 133. The statutes' requirement that all temporary price reductions be spread uniformly to all stations will prevent suppliers from competing vigorously in highly competitive areas; for the only way they could do so would be to lower their price to less competitive stations at the same time. Likewise, the vertical disintegration required by the statute subverts the general federal antitrust policy of maximizing consumer welfare by encouraging efficiency in distribution. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 280-89 (1978).

¹⁶⁹ *Exxon Corp.*, 437 U.S. at 131, nn.21, 22. Preemption analysis of a state statute that grants damages actions to indirect purchasers would probably survive the same test. Such a statute does not force anyone to violate federal antitrust law. *Exxon Corp.*, 437 U.S. at 131 (citing Clayton Act, 15 U.S.C. § 12 as amended by the Robinson-Patman Act, 15 U.S.C. § 13(b)).

¹⁷⁰ *Exxon Corp.*, 437 U.S. at 131.

¹⁷¹ *Id.* at 133.

¹⁷² However, other federal statutes have occasionally been held to preempt state antitrust law. See, e.g., *Connell Const. Co. v. Plumbers & Steam Fitters Local Union No. 100*, 421 U.S. 616, 635-37 (1975) (national labor policy as manifested in the National Labor Relations Act allows some limited application of federal antitrust law to labor activities; however, NLRA preempts application of state antitrust law); *Flood v. Kuhn*, 407 U.S. 258 (1972) (affirming a decision that the exemption given to baseball under the federal antitrust law, together with the need for uniformity in the area, mandated preemption of state antitrust law. *Id.* at 284-85). For further discussion of the baseball "anomaly," see Rubin, *supra* note 3, at 687-96; *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Weber v. Anheuser-Busch, Inc.* 348 U.S. 468, 473-82 (1955); *International Bd. of Teamsters v. Oliver*, 358 U.S. 283, 295-97 (1959). See *Partee v. San Diego Chargers Football Co.*, 194 Cal. Rptr. 367 (Sup. Ct. 1983) (extending baseball preemption to football); *Standard Radio & Television Co. v. Chronicle Pub. Co.*, 182 Cal. App. 2d 293, 6 Cal. Rptr. 246 (1960) (holding that California's Cartwright Act was preempted by the Federal Communications Act of 1934). The *Standard Radio* decision was called into question in *Younger v. Jensen*, 26 Cal. 3d 397, 161 Cal. Rptr. 905, 912 n.7 (1980). See generally Note, *Federal Preemption in Television Antitrust*, 13 STAN. L. REV. 629 (1961). See sources cited *supra* note 151 and accompanying text.

Court has said that preemption will be found only upon showing clear evidence of actual conflict, which in turn requires that compliance with the state law would force the defendant to disobey the federal law.¹⁷³

There has also not yet been a case in which an indirect purchaser has recovered damages under state law from a defendant who has already been forced under federal law to disgorge the full amount of the overcharge to a direct purchaser.¹⁷⁴ Such an application of state antitrust law would force the defendant to pay the multiple damages that the Supreme Court decided in *Illinois Brick* were not consistent with federal antitrust policy.¹⁷⁵ When faced with such a case, the courts ought to consider carefully what it means to say that federal and state antitrust are designed to reinforce and supplement each other.¹⁷⁶

¹⁷³ See *Exxon Corp.* 437 U.S. at 130. Even in that case, the state action exemption from the antitrust laws would permit a state statute to require a person to violate the federal antitrust laws, provided that the statute manifested a policy against competition that was "clearly articulated" and "affirmatively expressed," and the activity was "actively supervised" by the state itself. See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981).

¹⁷⁴ However, the Fifth Circuit has recently approved a settlement that included cash payouts to both direct purchasers asserting federal claims and indirect purchasers asserting pendent state law claims. See *In re Chicken Antitrust Litig.*, 669 F.2d 228, 238-39 (5th Cir. 1982). See also, *Union Carbide Corp. v. Superior Court*, 183 Cal. Rptr. 318 (1982), in which a California court of appeal held that in a Cartwright suit brought by indirect purchasers, known direct purchasers who had already filed a federal action were indispensable parties. The court held that the total treble-damage liability to which the defendants were exposed amounted to a "common fund," and that all plaintiffs having a stake in that fund must be joined if feasible to prevent duplicative recovery or exhaustion of the fund by one class of claimants. The court did not indicate how the "fund" should be divided if all direct and indirect purchasers were actually joined and prevailed. Presumably, under federal law the direct purchasers would be entitled to the entire "fund," regardless of the presence of the indirect purchasers. In short, merely joining direct and indirect purchasers into a single action does not solve the basic problem of *Illinois Brick* and indirect purchaser actions under state antitrust laws. "Only a ruling that federal law preempts the state law action by indirect purchasers would avoid" the problem of conflicting damages claims, the court concluded. *Union Carbide Corp.*, 183 Cal. Rptr. at 323. In *Alexander v. Cambridge-Lee Industries, Inc.*, 44 ANTITRUST TRADE REG. REP. (BNA) 974 (N.D. Cal April 21, 1983) the court held that the "common fund" doctrine did not justify removal of a state indirect purchaser claims to federal court, because indirect purchasers have no right under federal law "to share in any federal common fund recovery."

¹⁷⁵ *Illinois Brick*, 431 U.S. at 730-31.

¹⁷⁶ There is at least a possibility that the due process clause prevents a court from assessing damages against someone who has already paid out the full amount of the damages to a different plaintiff; that is, to award B damages for injuries when A has already been compensated for the injuries of both A and B. See *Russo & Dubin v. Allied Maintenance Corp.*, 95 Misc. 2d 344, 407 N.Y.S.2d 617 (1978) where the court refused to permit indirect purchasers to sue for damages under New York's Donnelly Act. To permit such an action, reasoned the court, "would create serious conflict between enforcement of State and Federal antitrust laws which would subject defendants to multiple liability in derogation of due process." 95 Misc. 2d at 347-48, 407 N.Y.S.2d at 620. This language was quoted with apparent approval by the federal district court in *Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 87 (E.D.N.Y. 1980). The New York state court in *Russo & Dubin* did not explain why such a duplicative recovery might violate the due process clause, nor did it cite any authority. However, it noted that at the time an action based on the same set of facts was being pursued by direct purchasers under federal law; so the risk of eventual duplicative awards

CONSOLIDATED FEDERAL LITIGATION AND SIMULTANEOUS STATE CLAIMS

The federal statute authorizing consolidation and transfer of pretrial proceedings in complex multidistrict litigation¹⁷⁷ has proved especially useful in large, multi-party federal antitrust cases.¹⁷⁸ Once there has been a finding, frequently by a federal grand jury or a federal court in a government prosecution, that an antitrust violation has occurred, plaintiffs filing actions under the same set of operative facts in all parts of the country may have their claims consolidated and transferred to a single federal judge for pretrial proceedings.¹⁷⁹ The savings in federal judicial time and in costs and effort to the parties can be enormous.¹⁸⁰

As a general rule, a party cannot resist consolidation and transfer of its claim if the claim qualifies for transfer under the statute.¹⁸¹ Defendants generally benefit from consolidation and transfer of antitrust cases more than plaintiffs do;¹⁸² the marginal cost to an antitrust defendant of having to litigate the same issues in a second forum can be high. For this reason, plaintiffs sometimes try to force settlement by maintaining a separate action that cannot be consolidated and transferred with the others even though the operative facts are the same.¹⁸³ If the claims in such a separate nuisance action are small but litigation costs are high, the defendants will have a strong incentive to settle the separate action.¹⁸⁴

was substantial. See *Shelter Realty Corp. v. Allied Maintenance Corp.*, 442 F. Supp. 1087 (S.D.N.Y. 1977). But see *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 368 (D. Conn. 1979); Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, *supra* note 11, at 211-18.

¹⁷⁷ 28 U.S.C. § 1407 (1976).

¹⁷⁸ For a history and general description of the statute, see 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3861 (1976), Howard, *A Guide to Section 1407 and Multidistrict Litigation*, 75 F.R.D. 577 (1977), and Note, *Consolidation and Transfer in the Federal Courts: 28 U.S.C., Section 1407 in Light of Rule 42(a) and 28 U.S.C. Section 1404(a)*, 22 HASTINGS L.J. 1289 (1971).

¹⁷⁹ FED. R. CIV. P. 42(a).

¹⁸⁰ See, e.g., *In re Corrugated Container Antitrust Litig.*, 447 F. Supp. 468 (J.P.M.D.L. 1978); see generally sources cited *supra* note 178.

¹⁸¹ *In re Swine Flue Immunization Prods. Liab. Litig.*, 464 F. Supp. 949 (J.P.M.D.L. 1979); *In re Viatron Computer Sys. Corp. Secs. Litig.*, 462 F. Supp. 382 (J.P.M.D.L. 1978); *In re Asbestos & Asbestos Insulation Material Prod. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.D.L. 1977); *In re Holiday Magic Secs. & Antitrust Litig.*, 372 F. Supp. 1167 (J.P.M.D.L. 1974); *In re Air Crash Disaster at Toronto Int'l Airport*, 346 F. Supp. 533 (J.P.M.D.L. 1972).

¹⁸² Most consolidated antitrust cases involve a common set of defendants but many different plaintiffs filing different actions. In such cases, the greatest beneficiary of consolidated litigation is the defendants. The exception is a group of antitrust actions involving many defendants but a single plaintiff. See *In re Uranium Indus. Antitrust Litig.*, 458 F. Supp. 1223 (J.P.M.D.L. 1978).

¹⁸³ *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, (1982); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980); *California v. California & Hawaiian Sugar Co.*, MDL 201, 588 F.2d 1270 (9th Cir. 1978).

¹⁸⁴ See, e.g., *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980) (where the plaintiffs claims were for under \$10,000).

One way that plaintiffs can avoid consolidation and transfer is by avoiding the federal court system altogether.¹⁸⁵ In several recent cases, plaintiffs have filed antitrust claims in state court under state law identical to federal claims against the same defendants, which had already been consolidated and transferred.¹⁸⁶ Some of these state filings can be characterized as nothing more than blatant attempts to avoid transfer and to force the defendant to pay the costs of discovery and pre-trial procedures twice. On the other hand, some classes of plaintiffs may have claims that can be recognized only under state law. Since the Supreme Court's decision in *Illinois Brick*, for example, indirect purchasers cannot bring certain kinds of antitrust damages actions under federal law.¹⁸⁷

The indirect purchaser who wants recovery for antitrust damages caused by a cartel has no choice but to bring his claim under state law,¹⁸⁸ but such a plaintiff need not necessarily file in state court. If diversity exists, the plaintiff may file in federal court and its claim can be transferred and consolidated with the other multidistrict federal claims. Additionally, a plaintiff with a cause of action under federal antitrust law could attach a state cause of action arising from the same operative facts under the federal court's pendent jurisdiction.¹⁸⁹ In such a situation, however, if an indirect purchaser brought an action for damages under both federal and state antitrust law, both actions would probably be dismissed. It would likely appear either on the face of the complaint or else at a very early stage in the proceedings that the plaintiff had no damages action under federal law, and therefore that the state cause of action was merely riding on the improper federal cause of action.¹⁹⁰

The federal courts, on the other hand, have consistently held that *Illinois Brick* does not preclude an action for an injunction.¹⁹¹ An indirect

¹⁸⁵ In order to avoid consolidation and transfer, one must not only bring an action in state court, but it must be brought under circumstances that it cannot be removed to federal court. Once a case is in federal court, whether by removal or by original action, it can be consolidated with other cases, so long as it qualifies under 28 U.S.C. § 1407. See *In re Professional Hockey Antitrust Litig.*, 369 F. Supp. 1117 (J.P.M.D.L. 1974); *In re Antibiotic Drugs*, 299 F. Supp. 1403 (J.P.M.D.L. 1969).

¹⁸⁶ See cases cited *supra* note 183.

¹⁸⁷ *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). At least five states have amended their laws expressly to give indirect purchasers the right to sue for damages. See Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, *supra* note 11.

¹⁸⁸ Unless he falls within one of the exceptions under federal law, such as the exception for pre-existing, fixed quantity, fixed cost contracts. See *Illinois Brick v. Illinois*, 431 U.S. at 732 n.12 (1977); *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1163-67 (5th Cir. 1979).

¹⁸⁹ See *Hagans v. Lavine*, 415 U.S. 528 (1974); *UMW v. Gibbs*, 383 U.S. 715 (1966).

¹⁹⁰ See *UMW v. Gibbs*, 383 U.S. at 726 (1966) (suggesting that pendent jurisdiction should be declined if the federal claim to which it is pendent is dismissed before trial); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 962 (7th Cir. 1982).

¹⁹¹ See *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979); *In re Beef Ind. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979); *International Ass'n of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

purchaser could bring an action under federal antitrust law seeking an injunction against the antitrust violation and attach a state antitrust claim seeking damages under a state antitrust statute that permits indirect purchaser damages actions. In that case, the indirect purchaser's state law claim could be transferred and consolidated with other federal claims.¹⁹²

It is possible, however, that some plaintiffs will ask for certain relief that can be given to them only if their actions are maintained in a state court. For example, a California court of appeals has recently held that California law permits "fluid" or *cy pres* recoveries in antitrust class actions.¹⁹³ Although the availability of fluid recovery in federal class actions has not been finally determined,¹⁹⁴ federal courts have been generally hostile toward fluid recovery mechanisms in class action cases.¹⁹⁵ Furthermore, once a claim, whether federal or state, has entered the federal courts, class action issues will likely be determined under federal and not under state law.¹⁹⁶ Thus it is likely that even if a California class were

¹⁹² See *In re Chicken Antitrust Litig.*, 669 F.2d 228 (5th Cir. 1982). In *In re Chicken*, the court approved a class action settlement that included payouts to indirect purchasers. The Fifth Circuit held that since indirect purchasers could, under Fifth Circuit doctrine, *id.* at 236 (citing *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)), maintain an action for an injunction under the federal antitrust laws, their pendent state claims were properly before the court. *Id.* at 237. Furthermore, the Fifth Circuit concluded, the federal court approving the settlement agreement could justifiably consider both state and federal claims. *Id.* at 240.

¹⁹³ *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981). In fluid recovery mechanisms, damages are not paid out to the class members in direct proportion to their injuries. Rather, the damages are paid to some institution to be used in a way that would benefit the plaintiff class, or else the damages are assessed as future price reductions by the defendants that will offset the injury caused by the alleged violation. Additionally, some fluid recovery judgments provide for damages to be paid as a penalty into the state treasury. See generally Note, *An Economic Analysis of Fluid Class Recovery Mechanisms*, 45 STAN. L. REV. 173 (1981); Note, *Damage Distribution in Class Actions: The Cy Pres Remedy* 39 U. CHI. L. REV. 448 (1972).

¹⁹⁴ See *Boeing v. Van Gemert*, 444 U.S. 472, 480 n.6 (1980).

¹⁹⁵ *Windham v. American Brands, Inc.* 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1017-18 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). But see *Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981) ("a careful case-by-case analysis of use of the fluid recovery mechanism is the better approach."). The availability of fluid recovery can be an important factor in determining manageability of the class suit. As a result, the option of fluid recovery can make a class action easier to certify. See Advisory Committee's Note to Proposed Rule 23, 29 F.R.D. 98, 102-04 (1966); Comment, *The California State Courts and Consumer Class Actions for Antitrust Violations*, 33 HASTINGS L.J. 689, 700 (1982).

¹⁹⁶ Whether a class action under state law would be permitted a fluid recovery in federal court, if the fluid recovery would be available in state court, is a difficult issue. As a general matter federal law determines procedure in all federal class actions, whether under federal law or state. See *Minnesota v. U.S. Steel Corp.*, 44 F.R.D. 559, 568 (D. Minn. 1968). In *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), the court found that to construe Federal Rule 23 as authorizing fluid recoveries would effectively enlarge or modify a substantive right under the antitrust laws, in violation of the Enabling Act, 28 U.S.C. § 2072 (1976). Manifestly, permitting fluid recovery in an antitrust action under state antitrust law, where the state law has already been interpreted as authorizing fluid recovery in state court,

entitled to a fluid recovery in a Cartwright Act case, the fluid recovery would be unavailable if that same state law action were heard in federal court. The only way the plaintiff class could have the benefit of such a method of recovery would be if the action remained in state court.

In addition to permitting fluid recovery, the California law of class actions can be more favorable to plaintiffs than under federal rule 23.¹⁹⁷ This is particularly true with respect to federal class actions brought under rule 23(b)(3), as most antitrust class actions are. For example, the Supreme Court has held that individual notice must be given to identifiable members of classes formulated under rule 23(b)(3).¹⁹⁸ However, California permits notice by publication in certain instances.¹⁹⁹ Likewise, in a federal rule 23(b)(3) class action the cost of sending notice must be borne by the plaintiff,²⁰⁰ a factor which frequently renders a federal class action impracticable.²⁰¹ However, under California law the trial judge may order the defendant to share in notice costs or even to pay the full cost.²⁰² In these instances, if such a lawsuit brought under California antitrust law were removed to federal court, rule 23 would likely govern and the plaintiff class would lose these state-created advantages.²⁰³

From the federal standpoint, state antitrust filings contemporaneous with multidistrict federal antitrust litigation raise several problems of case administration that are antagonistic to the original purpose behind 28 U.S.C. section 1407. That statute was designed to force the consolidation and transfer of multiple actions based on common operative facts to a single district for pretrial proceedings. Although the presence of a renegade state claim will not defeat the federal policy of reducing excessive strain on the federal court system, it can impose a substantial

would not be enlarging a substantive right. On the other hand, there is a strong interest in interpreting the federal rules uniformly, and as a general matter the federal courts have not permitted fluid recoveries in federal class actions. *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4509 (1982).

¹⁹⁷ *See, e.g.*, *Rosack v. Volvo Corp. of Amer.* 131 Cal. App. 3d 741, 182 Cal. Rptr. 800 (1982) (permitting a state law resale price maintenance claim to proceed as a class action, even though the class members would have to prove the fact of injury individually and therefore could not show common question "predominance," as required for federal certification under Rule 23(b)(3)). *See Hovenkamp, Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213, 216-18 (1983).

¹⁹⁸ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974).

¹⁹⁹ *See Cartt v. Superior Court*, 50 Cal. Ct. App. 3d 960, 969-70, 124 Cal. Rptr. 376, 382-83 (1975).

²⁰⁰ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

²⁰¹ *Id.* at 167; *see also In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Considine v. Park Nat'l Bank*, 64 F.R.D. 646, 648 (E.D. Tenn. 1974).

²⁰² *Civil Service Employees Liab. Ins. Co. v. Superior Court*, 22 Cal. 3d 363, 376, 584 P.2d 497, 506, 149 Cal. Rptr. 360, 369 (1978); *Roth v. Dept. of Veteran Affairs*, 110 Cal. App. 3d 622, 167 Cal. Rptr. 552 (1980).

²⁰³ *See generally* Comment, *The California State Courts and Consumer Class Actions for Antitrust Violations*, 33 HASTINGS L.J. 689 (1982).

burden on the defendant, who thereby loses the advantage of being able to litigate against all parties in a single proceeding.²⁰⁴

*The Simultaneous Filing Problem: The "Artful Pleading"
Doctrine and Removal of State Antitrust Complaints*

Thus far the federal courts hearing consolidated antitrust complaints have not found an adequate way to deal with concurrent state filings. For example, *Three J Farms Inc. v. Alton Box Board Co.*²⁰⁵ arose out of the corrugated container price-fixing litigation. In 1977, the Judicial Panel on Multidistrict Litigation transferred thirty-seven private actions arising out of the same conspiracy to the southern district of Texas.²⁰⁶ Thereafter, civil actions arising out of the same operative facts were continually transferred to Texas.

In order to avoid transfer, the plaintiffs in *Three J Farms* filed their complaint in state court under the antitrust law of South Carolina.²⁰⁷ The plaintiffs alleged that they wanted to use the South Carolina statute because it permitted successful plaintiffs to recover the full purchase price rather than three times the overcharge as the Sherman Act provides.²⁰⁸ In any case, the complaint filed in the South Carolina state court was identical to the unified and consolidated complaint adopted by the plaintiffs in the federal consolidated litigation in Texas. Furthermore, the plaintiffs in *Three J Farms* requested discovery of all documents that the defendants had produced in the Texas consolidated federal litigation. By that time, the consolidated discovery process had generated 1.5 million documents. This demand, as the federal district court of South Carolina

²⁰⁴ Perhaps 28 U.S.C. § 1407 does not manifest a federal interest in preventing duplicative litigation of claims in state courts. Indeed, nothing in the statute indicates such a concern. On the other hand, there is undoubtedly a federal interest—recognized in the United States Constitution—in protecting persons (not court systems) from duplicative litigation in any court system. The doctrine of *res judicata*, for example, recognizes a federal interest in preventing duplicative litigation in state courts as well as federal. See Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976). That duty is especially important here, because an early judgment in the state court could preclude relitigation of certain issues in the multidistrict federal proceeding. Under the criteria established for offensive collateral estoppel in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), the defendant in the separately-filed state antitrust case who is also a defendant in the federal multidistrict litigation would be forced to litigate fully and fiercely all issues that might be used against it in the federal proceeding. In such a case the state-law defendant would have actual knowledge that issues determined against it in the state proceeding might be used by a different plaintiff in the subsequent federal trial. See the discussion of *Parklane Hosiery* *infra* text accompanying notes 320-30.

²⁰⁵ 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

²⁰⁶ See *In re Corrugated Container Antitrust Litig.*, 441 F. Supp. 921 (J.P.M.D.L. 1977).

²⁰⁷ S.C. CODE ANN. § 39-3-10 (Law. Co-op. 1976).

²⁰⁸ *Three J Farms*, 1979-1 Trade Cas. (CCH) ¶ 62,423, at 76,548.

noted, "would destroy the effectiveness of the Judicial Panel on Multidistrict Litigation" ²⁰⁹

The district court found several reasons why the state cause of action had been properly removed to federal court and could therefore be transferred. First, the judge held that the plaintiff's state law complaint really stated a cause of action under the Sherman Act, in spite of the fact that the complaint asserted that it "contain[ed] no charges of federal law violations."²¹⁰ The logic of that holding is questionable. The complaint filed in state court referred to state and not federal law. However, the judge was obviously influenced by the fact that the state law complaint lifted from the unified federal complaint "entire paragraphs without any change of language or even punctuation."²¹¹

Second, the judge decided that the state complaint probably failed to state a cause of action under the South Carolina antitrust law because that law "was limited many years ago to exclude activities having an effect upon interstate commerce."²¹² Thus, he concluded, "any claim for damages resulting from the importation or the sale of imported corrugated containers is not a South Carolina claim, but purely a federal claim."²¹³

That argument supports dismissal of the complaint by the state judge in the original proceeding for failure to state a cause of action under state law, but does not support removal to a federal court. Although the federal courts have exclusive jurisdiction of actions brought under federal antitrust law,²¹⁴ if a state court has no jurisdiction over a cause of action, the claim cannot be removed to the federal court but must be dismissed.²¹⁵ A claim filed in a state court alleging a cause of action under the federal antitrust laws could therefore not be removed to the federal court.²¹⁶

²⁰⁹ *Id.* The district judge inferred that the plaintiff's purpose was "to harass the defendants by requiring them to fight on two fronts, produce two sets of documents, endure discovery on the same issues in courts 1,500 miles apart, all in the hope of obtaining a settlement from the defendants out of economic necessity . . ." *Id.* at 76,550.

²¹⁰ *Three J Farms*, 1979-1 Trade Cas. (CCH) ¶62,423, at 76,550.

²¹¹ *Id.*

²¹² *Id.* (citing *State v. Virginia-Carolina Chem. Co.*, 71 S.C. 544, 51 S.E. 555 (1905)).

²¹³ *Three J Farms*, 1979-1 Trade Cas. (CCH) ¶ 62,423, at 76,550.

²¹⁴ *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 287 (1922); *Blumenenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920); *Vaugh & Co. v. Saul*, 143 Ga. App. 74, 86, 237 S.E.2d 622, 631 (1977).

²¹⁵ *Lambert Run Coal Co. v. B&O R.R.*, 258 U.S. 377 (1922); *People v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir. 1982); see C. WRIGHT, A. MILLER & E. COOPER, *supra* note 196, at § 3721.

²¹⁶ *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261 (1922); *State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972). See *In re Sugar Antitrust Litig.*, 588 F.2d 1270, 1272 n.4 (9th Cir. 1978); In *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980), the plaintiff filed under South Carolina law against the same defendants and under the same operative facts as thirty federal cases that had been consolidated by the Panel. *In re Wiring Device Antitrust Litig.*, 444 F. Supp. 1349 (J.P.M.D.L. 1978). There was diversity between the parties but the plaintiff's *ad damnum* stated less than the \$10,000 jurisdictional minimum for diversity actions. *Id.* at 81. However, the federal court assumed that the plaintiffs would request attorney's fees in

The circuit courts have generally overruled district courts finding federal causes of action in complaints which attempted to plead state causes of action.²¹⁷ Antitrust liability is created by two overlapping and in some cases virtually congruent bodies of substantive law. A foundation of American federalism is that in such situations an aggrieved party can seek its protection from either the federal or the state government. Furthermore, implicit in the two-tier antitrust enforcement scheme is the plaintiff's right to opt for state law, particularly if state substantive or procedural law makes it to the plaintiff's advantage to do so.

excess of \$10,000 in the state action, even though no South Carolina statute authorized attorneys' fees to successful plaintiffs in antitrust cases. *Id.* at 81-82. The court concluded that more than \$10,000 was "potentially" in controversy, and refused to remand. *Id.* at 82.

The district court also held that although the plaintiff had pled exclusively under state antitrust law, a federal antitrust question was nevertheless "integral to its claims." *Id.* at 82. The court concluded that since the transactions giving rise to the cause of action were interstate, and since the South Carolina antitrust act had been interpreted as not reaching "interstate commerce of any kind," the complaint failed to assert a cause of action under state law. *Id.* at 83. From that premise the judge concluded that the plaintiffs' complaint *did* state a cause of action under the federal antitrust laws, in spite of the fact that it purported not to do so. *Id.* at 83.

Having granted removal on two different and inconsistent grounds—first, that there was a sufficient amount in controversy for federal diversity jurisdiction, so removal of the state claim was proper; secondly, that there was no state claim at all, because it was really a federal claim in disguise—the court assumed that the case as it had been removed to the federal court contained both state and federal claims and entertained a motion to dismiss on the merits. Dismissing the state claim was relatively easy, since the state antitrust law did not reach transactions in interstate commerce. *Id.* at 84. Additionally, the plaintiffs were indirect purchasers and the court concluded that the South Carolina courts would probably construe the South Carolina statute to permit recovery only by direct purchasers. *Id.* at 85-86. Likewise, the court concluded that because the plaintiff was an indirect purchaser, it had no claim under federal law. *Id.* at 86-88.

In the *Three J Farms* litigation, see *supra* text accompanying notes 205-13, the federal district judge held as an alternative ground for removal that, although there was not sufficient diversity to support removal, the plaintiffs had in fact included a party plaintiff "in an attempt to defeat federal court jurisdiction." *Three J Farms*, 1979-1 Trade Cas. (CCH) ¶ 62,423, at 76,551.

²¹⁷ But see *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) where the Supreme Court acknowledged that under certain circumstances state antitrust claims could be so "federal in nature" that they would support removal. *Id.* at 397 n.2 (quoting *C. Wright, A. Miller & E. Cooper, supra* note 178 § 3722, at 564-66, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.") The Supreme Court therefore left undisturbed the finding of the district court, affirmed by the Ninth Circuit, that a plaintiff cannot avoid removal by "artfully" casting "essentially federal law claims" as state law claims. *Id.* at 397 n.2. Justice Rehnquist did not deal with the question of the derivative nature of removal jurisdiction. Perhaps this was because he viewed the state-filed claim not as an artfully pled federal antitrust claim, but rather as some sort of hybrid, relying on state law but invoking sufficient federal interests to support federal question removal. Justice Rehnquist did not say that the plaintiff's state complaint was in fact a federal complaint; rather, he said that "some of the [state filed] claims had a sufficient federal character to support removal." *Id.* at 397 n.2. Although the precise meaning of that statement is not clear, it seems that such a "hybrid" claim is a legal novelty. See *Iowa v. Binney & Smith*, 42 ANTI-TRUST & TRADE REG. REP. (BNA) 1274 (S.D. Iowa 1982).

*California v. California & Hawaiian Sugar Co.*²¹⁸ involved a separate filing situation much like the ones in the container and wiring device litigations. The state of California and a private plaintiff representing a class of consumers brought an action under the Cartwright Act alleging price fixing in the sugar industry. At the time approximately 100 separate actions under federal antitrust law involving several hundred plaintiffs and fourteen defendants had been consolidated for pretrial proceedings.²¹⁹ The defendants had removed the state-filed case to federal court for consolidation with the others. The district court subsequently denied the plaintiffs' motion to remand and held that although the complaint asserted only state law claims, it really started a cause of action under federal antitrust law. In fact, much of the language of the state law complaints was copied verbatim from U.S. criminal indictments alleging violations of federal antitrust law.²²⁰

The rationale for the district court's ruling strikes at the heart of the two-level antitrust enforcement scheme. For example, before filing the state law claims, the state of California had filed a federal action based on the same operative facts and sought certification of a consumer class and a public entity class. The federal district court had denied certification of the consumer class because it was composed largely of indirect purchasers.²²¹ Thus, the Ninth Circuit vacated the district court's refusal to remand and concluded that the lower court's holding was tantamount to a dismissal of their cause of action under the rule of *Illinois Brick*. The Ninth Circuit was uncertain, however, whether the California courts would construe the Cartwright Act to bar damages to an indirect purchaser.²²² The Ninth Circuit concluded that "to deny remand under these extraordinary circumstances amounts to federal preemption of state antitrust law by judicial act where it is conceded that there is no congressional preemption."²²³

The Ninth Circuit's answer to the problem of concurrent state and federal filings was a principled solution consistent with the preservation of federalism and the two-level antitrust system. Implicit in the notion

²¹⁸ 588 F.2d 1270 (9th Cir. 1978). For the consolidated federal litigation, see *In re Sugar Industry Antitrust Litig.*, 433 F. Supp. 1122 (J.P.M.D.L. 1977). For a discussion of the problem of simultaneous filings, see generally Note, *Simultaneous Filing of State and Federal Antitrust Actions: A Jurisdictional Dilemma*, 41 U. PITT. L. REV. 629 (1980).

²¹⁹ *California & Hawaiian Sugar*, 588 F.2d at 1271.

²²⁰ *Id.* at 1272.

²²¹ *Id.* at 1271. The district court issued that order before *Illinois Brick* was decided. See *California & Hawaiian Sugar*, 588 F.2d at 1272-73.

²²² The Ninth Circuit's opinion was written before the California legislature amended the Cartwright Act to grant damages actions to indirect purchasers. *California & Hawaiian Sugar*, 588 F.2d at 1273 n.6.

²²³ *California & Hawaiian Sugar*, 588 F.2d at 1273. The court conceded, however, that denying removal and permitting simultaneous federal and state claims to proceed may "pose grave problems in the management of litigation." *Id.* at 1273.

that Congress has sought to preserve dual antitrust enforcement is a recognition that there are some occasions when a plaintiff would be better off bringing a case in state court under state law than under federal law. More fundamentally, the two-tier enforcement mechanism impliedly admits that sometimes state courts will recognize and value different interests than the federal courts. As a result, state law will sometimes be substantively different from federal law. Nowhere has Congress mandated that state antitrust law is permissible only when it is identical with federal law, even though it may be presumed that fundamental inconsistencies between state and federal law will be resolved in favor of federal law.²²⁴ The system of federalism itself indicates the values that clearly need to be protected: a plaintiff's interest in state antitrust is strongest when the state court can provide a kind of relief that the federal court cannot. In short, the federal system can be both used and abused—and the federal courts have a legitimate interest in protecting federal defendants and the federal court system from the abuses.

The issues at stake in the conflict between state and federal antitrust law are well illustrated by the recent debate between Justices Rehnquist and Brennan in *Federated Department Stores v. Moitie*.²²⁵ In 1976, the Moities, retail purchasers, filed a Sherman Act claim in the northern district of California alleging that the defendant department stores had fixed the retail price of women's clothing. At that time *Reiter v. Sonotone*²²⁶ had not yet been decided by the Supreme Court. In *Reiter*, the Court held that retail purchasers who are victims of price-fixing are injured in their "business or property"²²⁷ for the purposes of private antitrust actions in federal court.

The district court in *Moitie* took the opposite position and held that the Moities lacked standing.²²⁸ Other plaintiffs in the same action appealed. The Moities, however, filed a similar complaint based on the same operative facts under California's Cartwright Act and hoped that the California courts would interpret the "business or property" clause of the private action provision of the California antitrust law²²⁹ differently. The defendants promptly removed the action to federal court arguing that the state complaint actually stated a federal cause of action. The defendants then moved for dismissal on the grounds that the earlier

²²⁴ But see *supra* text accompanying notes 48-76.

²²⁵ 452 U.S. 394 (1981).

²²⁶ 442 U.S. 330 (1979).

²²⁷ 15 U.S.C. § 15 (1976).

²²⁸ *Weinberg v. Federated Dep't Stores*, 426 F. Supp. 880, 885 (N.D. Cal. 1977), *rev'd sub nom.* *Moitie v. Federated Dep't Stores*, 611 F.2d 1267 (9th Cir. 1980), *rev'd and remanded*, 452 U.S. 394 (1981).

²²⁹ CAL. BUS. & PROF. CODE § 16750 (West 1981) provides: "Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore . . . to recover three times the damages sustained"

federal decision was *res judicata* as to the subsequent state filed claim. The Federal Court of the Northern District of California held that the state filed action was properly removed because although "artfully couched in terms of state law," the state complaint was "in many respects identical" to the prior federal complaint.²³⁰ The *Moities* appealed to the Ninth Circuit.²³¹ Meanwhile, the United States Supreme Court decided *Reiter v. Sonotone*.²³²

The issue before the United States Supreme Court in *Moitie* was simply whether the first federal claim which incorrectly stated federal law was *res judicata* with respect to the subsequently filed state claim. The Supreme Court held that it was. Justice Rehnquist, speaking for the majority, left undisturbed a lower court fact finding that the state law claim asserted by the *Moities* was in reality an "artfully" pleaded federal claim.²³³ Having accepted that conclusion, the Supreme Court's decision was inevitable. The original dismissal of the *Moitie's* federal antitrust action was *res judicata* as to any subsequent action between the same parties based on the same operative facts and asserted under the same body of law, even though the originally dismissed action might be later overruled in a different case.²³⁴

Justice Brennan dissented vigorously, although he agreed that the federal judgment must ultimately bar the Cartwright Act claim. However, Justice Brennan attacked the Ninth Circuit's holding that the *Moitie's* state antitrust claim was in reality an "artfully pleaded" federal claim. When a plaintiff's claim may be "brought under either federal or state law, the plaintiff is normally free to ignore the federal question and rest his claim solely on the state ground."²³⁵

²³⁰ *Moite*, 452 U.S. at 396.

²³¹ The Ninth Circuit decided that the state law complaint did in fact state a federal claim, but also held that "public policy and simple justice" mandated that *res judicata* not apply as between the initial federal dismissal and the subsequently filed state law claim since the federal dismissal had been reversed in favor of the appealing parties. *Moitie*, 611 F.2d at 1269-70.

²³² See *supra* note 226.

²³³ *Moitie*, 452 U.S. at 397 n.2.

²³⁴ *Id.* at 398 (citing *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chocot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927); *Wilson's Ex'r v. Deer*, 121 U.S. 525, 534 (1887)).

In a concurring opinion Justice Blackmun, 452 U.S. at 402 (Blackmun, J., concurring) (joined by Marshall, J.) also concluded that the subsequent state claim was barred by the doctrine of *res judicata*. However, Justice Blackmun's decision was based on a different rationale. Justice Blackmun argued that *res judicata* applies not only to all claims actually raised in the first case but also to all claims that could have been raised. Since the *Moities* could have asserted the state law claim together with the federal law claim in the original action under the court's pendent jurisdiction, the "respondents were obligated to plead [the state law] claims [in the first action] if they wished to preserve them." 452 U.S. at 404.

²³⁵ *Moitie*, 452 U.S. at 407 (Brennan, J., dissenting). Any other rule would emasculate state antitrust law:

So long as States retain authority to legislate in subject areas in which Congress has legislated without preempting the field, and so long as state courts

The "artful pleading" doctrine used by the Ninth Circuit and affirmed by the Supreme Court majority undercuts state authority, argued Justice Brennan, unless it is limited to those instances where federal law has preempted state law.²³⁶ The obligation of the federal court is to "scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority."²³⁷

Although the general principle of *res judicata* mandated the result reached by the court in *Moitie*, the majority's rationale for that conclusion is antagonistic to the intent of Congress to permit states to have their own antitrust laws. For example, if the Supreme Court had decided that consumers do not have standing under federal antitrust law, then any attempt by a consumer to obtain a contrary ruling under state law could be precluded by the "artfully pleaded" doctrine. This rule as interpreted by the majority in *Moitie* goes too far. The simple fact is that the *Moities* went into state court not merely to avoid a federal forum, but to attempt to benefit from a state law remedy that the district court held federal law does not provide.

Justice Brennan's argument, on the other hand, that the "artful pleaded" doctrine should be restricted to those instances when the state claim has been preempted by federal law is too narrow. The appropriate question in the artful pleaded cases is not whether federal law has preempted all state law in a particular area, but whether the plaintiff is relying on state law in order to obtain a particular state remedy that federal law does not grant or whether the plaintiff in state court is seeking the same remedy that the federal law provides but is merely seeking to avoid the federal forum. This analysis should illuminate the issues raised by the separate filing cases.²³⁸

The separate filing cases involve two sharply conflicting values. On the one hand, there is a strong federal and state interest in preventing excessive litigation of complex issues. When massive antitrust litigation, such as the corrugated paper action,²³⁹ has been consolidated into a giant

remain the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law. It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff *could have* asserted a federal claim based on the same set of facts underlying his state claim.

Id. In *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 577 (N.D. Cal. 1981), the district court distinguished *Moitie* and limited it to its facts by holding that a state antitrust filing would meet the standards of an artfully pleaded federal complaint "only when the plaintiff by his conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one." See also *Highes Const. Co. v. Rheem Mfg.*, 487 F. Supp. 345 (N.D. Miss. 1980).

²³⁶ *Moitie*, 452 U.S. at 407-08 (Brennan, J., dissenting).

²³⁷ *Id.* at 408 (Brennan, J., dissenting).

²³⁸ See *supra* notes 177-204 and accompanying text.

²³⁹ See *supra* notes 205-17 and accompanying text.

pre-trial effort involving hundreds of parties and millions of documents, both the federal system and the states have a great interest in preventing the process from being unnecessarily duplicated in a different forum. On the other hand, there is a strong state interest in maintaining the integrity of state antitrust law, particularly when state law creates legitimate rights or remedies that federal law does not provide.

Keeping these values in mind, a federal district court examining a removed, state filed claim in a concurrent filing situation should attempt to answer one question objectively: must the plaintiff remain in state court to obtain the relief sought, or does the federal court provide an equally good forum?

In many such cases, a federal district court would be justified in holding that the state claim is in reality an artfully pleaded federal complaint.²⁴⁰ In most instances, analysis reveals that even if the rights granted under state law are different from those created under federal law, the state law complaint could be appended to a federal complaint and both state and federal issues could be litigated in the consolidated proceeding.²⁴¹ This rule would apply even with respect to those states that allow indirect purchasers damage actions. As noted above, federal law currently permits an indirect purchaser to claim injunctive relief.²⁴² An indirect purchaser seeking damages in a consolidated federal antitrust action may circumvent this rule by filing a federal claim seeking an injunction and appending a state law damages claim under the federal court's pendent jurisdiction.²⁴³ Only in the relatively rare case where the plaintiff would lose a legitimate state created right by being forced into the federal forum should the plaintiff be permitted to keep his cause of action in state court.²⁴⁴

²⁴⁰ Whether this justifies removal under circumstances where the state court would not have had subject matter jurisdiction, as would be the case with respect to a state filed antitrust complaint, is a difficult question. See *supra* notes 214-16 and accompanying text. Under the doctrine that removal jurisdiction is entirely derivative and that the federal court acquires no jurisdiction by removal where the state court had no jurisdiction to begin with, it would appear that the federal court's only alternative is to dismiss the complaint. See *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377 (1922). In *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 580 (N.D. Cal. 1981), the court held that once a state antitrust claim filed in state court was removed and determined to be an artfully pleaded federal claim, the only course of action available to the federal court was dismissal "under the derivative jurisdiction doctrine." The "derivative jurisdiction" rule has been criticized with respect to federal question cases, because it produces "undesirable results." 14 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 3722, at 574-76.

²⁴¹ In the *Corrugated Container* litigation, *Three J Farms v. Plaintiffs' Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 1012 (1982), the state filing plaintiffs were also plaintiffs in the federal proceeding. As a part of the eventual negotiated settlement in the multidistrict federal action, all such state claims were dropped. See *supra* notes 205-17 and accompanying text. *Adams Extract Co. v. Chesapeake Co. of Va.*, 643 F.2d 196, 202-06 (5th Cir. 1981).

²⁴² See cases cited *supra* note 202.

²⁴³ See *supra* notes 188-204 and accompanying text.

²⁴⁴ See, e.g., *Bruno v. Superior Court*, 127 Cal. Ct. App. 3d 120, 179 Cal. Rptr. 343 (1981)

In such a case, a cautious use of a federal injunction of the state court proceedings, pending determination of the federal proceedings, might be the best way to maintain the integrity of the multidistrict process and the state antitrust scheme.²⁴⁵

*The Simultaneous Filing Problem:
Federal Injunction of State Judicial Proceedings*

In a footnote to its opinion in the consolidated sugar antitrust litigation, the Ninth Circuit suggested that a federal injunction of simultaneous state antitrust proceedings would be a more forthright solution to the simultaneous filing problem than the federalizing and removal or dismissal of state law complaints.²⁴⁶ The Fifth Circuit has recently taken that same approach in the corrugated container antitrust litigation.²⁴⁷ However, the use of a federal injunction against a state court in such circumstances raises serious problems of federal-state relations.

In the *Three J Farms*²⁴⁸ case, the Fifth Circuit enjoined the state law plaintiffs from pursuing "any claims relating to this class action in any court other than the United States District Court in Texas."²⁴⁹ Use of a federal injunction to prevent a plaintiff from filing a state law complaint in order to avoid federal consolidation and transfer is a novel exercise of the power of the federal court. Since 1793 the federal Anti-Injunction Act²⁵⁰ forbids federal courts from enjoining state proceedings except in a narrow, strictly construed range of circumstances.

The Anti-Injunction Act permits a federal court to enjoin state proceedings only when it is "expressly" authorized to do so by an act of Congress, when the state proceeding is itself a threat to the jurisdiction of a federal court, or when an injunction is necessary to protect or give effect to a judgment of the federal court.²⁵¹ Whether any of these exceptions to the anti-injunction provision will permit a federal injunction of state proceedings in the simultaneous filing cases is a perplexing problem that the courts have only begun to address.

(state law permits an antitrust plaintiff class to recover damages by fluid or by pres method). For a discussion of the liberalized class action procedures permitted by California courts see *supra* notes 193-204.

²⁴⁵ See *infra* text accompanying notes 297-99.

²⁴⁶ *California v. California and Hawaiian Sugar Co.*, 588 F.2d 1270, 1273 n.7 (9th Cir. 1978). However, the Ninth Circuit has now decided that the Anti-Injunction Act forbids an injunction in such circumstances. *Alton Box Board Co. v. Esprit de Corp.*, 682 F.2d 1267 (9th Cir. 1982).

²⁴⁷ *Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1333.

²⁵⁰ See 28 U.S.C. § 2283 (1976).

²⁵¹ *Id.*

"Expressly Authorized by Act of Congress"

The Anti-Injunction Act permits a federal court to enjoin a state proceeding when a federal statute under which the federal court is hearing the complaint "expressly" authorizes the injunction.²⁵² The Supreme Court has interpreted this exception to mean that the injunction is permissible when the federal statute at issue creates a "specific and uniquely federal right or remedy" and enforcement of that right "could be frustrated if the federal court were not empowered to enjoin a state court proceeding."²⁵³ In short, the "expressly authorized" exception to the Anti-Injunction Act means that the federal injunction need only be implicitly authorized. For example, in *Mitchum v. Foster*,²⁵⁴ the Supreme Court unanimously held that 42 U.S.C. section 1983 was designed to protect federal civil rights from state infringement and therefore empowered federal courts to enjoin a state proceeding which might in and of itself interfere with federally protected constitutional rights, even though nothing in the language of section 1983 expressly provides for federal injunctions of state judicial proceedings.²⁵⁵

In *Vendo Co. v. Lektro-Vend Corp.*,²⁵⁶ a divided Supreme Court addressed the question whether federal antitrust law might "expressly authorize" an injunction of state proceedings that interfere with the protection of a federally created right. That case involved a covenant suit by a promisee against a promisor for breach of a covenant not to compete pursuant to a sale of the promisor's business assets.²⁵⁷ The promisee sued in state court and won a judgment after protracted litigation. During that litigation the promisor filed its own suit in federal district court alleging that the noncompetition covenant violated antitrust law.²⁵⁸ That suit was allowed to "lie 'dormant'" until the state supreme court affirmed the judgment for the promisee.²⁵⁹ At that time, the promisor petitioned the federal court for an injunction against enforcement of the state judgment.²⁶⁰

The facts of *Vendo Co.* did not present a particularly compelling case for granting a federal injunction of state proceedings. In nine years of state court litigation, the federal antitrust issues were never fully litigated

²⁵² *Id.*

²⁵³ *Mitchum v. Foster*, 407 U.S. 225, 237-38 (1972); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 259 (1980).

²⁵⁴ 407 U.S. 225 (1972).

²⁵⁵ See generally 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 4224, at 330.

²⁵⁶ 433 U.S. 623 (1977).

²⁵⁷ *Vendo Co.*, 433 U.S. at 626-27.

²⁵⁸ *Id.* at 627.

²⁵⁹ *Id.* at 628. The judgment was affirmed by the state court not on the theory of breach of the noncompetition covenants, but rather upon the theory that the promisor breached a fiduciary duty owed to the promisee. *Id.* at 628 (citing *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 321 N.E.2d 1 (1974)).

²⁶⁰ *Vendo Co.*, 433 U.S. at 629.

in the state courts. The defendant had interposed a federal antitrust defense in the state proceeding based on the noncompetition covenants, but then voluntarily withdrew it.²⁶¹

In a three member plurality opinion, Justice Rehnquist found that the provision for private injunctive relief in federal antitrust law²⁶² did not "expressly" create an exception to the Anti-Injunctive Act. Justice Rehnquist interpreted the *Mitchum v. Foster*²⁶³ test as requiring for such an exception (1) that the federal statute at issue create a "uniquely federal right or remedy" and (2) that the statute "could be given its intended scope only by the stay of a state court proceeding."²⁶⁴

Justice Rehnquist compared the legislative history of the antitrust laws with that of section 1983. He concluded that when section 1983 was passed, Congress had been particularly concerned with protecting federal rights from state infringement, and that one way a state could violate federal civil rights was through abusive state court litigation. In short, section 1983 was explicitly designed by Congress to alter the relationship between the states and the federal government and to prevent the state itself from interfering with federal rights.²⁶⁵ Conversely, no one had suggested that when Congress passed the federal antitrust laws it "was concerned with the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts."²⁶⁶

Justice Rehnquist's test dictates that if an exception to the Anti-Injunction Act is not "expressly authorized" within a statute itself, the statute's legislative history must at least show some expression of concern by Congress that state proceedings could be used to deny enforcement or protection of federally created rights. Since there was no such evidence in the legislative history of the federal antitrust laws, such laws did not in any instance authorize a federal court to enjoin state proceedings.

In a concurring opinion joined by Chief Justice Burger, Justice Blackmun took a different approach. He believed that section 16 of the Clayton Act authorized a federal injunction of state proceedings, but only in those circumstances when the state proceedings themselves were "being used as an anticompetitive device" to violate the federal antitrust laws.²⁶⁷ Presumably, even though the framers of the Sherman and Clayton Acts

²⁶¹ *Id.* at 627-28 n.2. However, before the defendant withdrew the federal defense in state court, the Illinois Appellate Court held that the district court erred in striking that defense. *Id.* at 627-28 n.2 (citing *Vendo Co. v. Stone*, 13 Ill. App. 3d 291, 300 N.E.2d 632 (1973)).

²⁶² 15 U.S.C. § 26 (1976).

²⁶³ *Mitchum v. Foster*, 407 U.S. 225 (1972). See sources cited *supra* note 253.

²⁶⁴ *Vendo Co.*, 433 U.S. at 632.

²⁶⁵ *Id.* at 633.

²⁶⁶ *Id.* at 634.

²⁶⁷ *Id.* at 644 (Blackmun, J., concurring) (citing *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972)). See also *Technician Medical Information Sys. Corp. v. Green Bay Packaging, Inc.*, 480 F. Supp. 124 (E.D. Wis. 1979); R. BORK, *supra* note 168, at 347-64.

did not contemplate that state court proceedings might be used to violate the federal antitrust laws, if they had they would have agreed that the state court proceedings could then be enjoined. In the case before the Court, however, the state proceedings were not themselves a federal antitrust violation.

The four dissenters in *Vendo*²⁶⁸ agreed with the concurring opinion that a federal injunction under the antitrust laws against a state proceeding was authorized by Congress when the state proceeding was itself a violation of the federal antitrust laws.²⁶⁹ The dissenters disagreed with the concurring justices, however, about the particular case before the Court. They accepted a finding of fact by the district court that the plaintiffs in the state case (the promisees under the noncompetition covenant) were attempting to monopolize their market, and that judicial enforcement of the noncompetition covenant was a mechanism for achieving monopoly in violation of the federal antitrust laws.²⁷⁰ The dissenters concluded that the state litigation was used in this particular case as part of a plan to monopolize illegally, and therefore, a federal injunction of the state judgment was proper.²⁷¹

Six members of the Supreme Court in *Vendo* concluded that there would be some occasions when a federal injunction of state proceedings was "expressly authorized" under the federal antitrust laws.²⁷² However, all members of the Court agreed that no such injunction would be permissible under the "expressly authorized" exception to the Anti-Injunction Act unless the state litigation itself was anticompetitive activity in violation of the federal antitrust laws. The simultaneous filing cases do not appear to involve such a violation. In some instances the state filings may be an attempt to subvert proper adjudication of federal antitrust claims,²⁷³ but they cannot be reasonably interpreted as antitrust violations themselves. Thus, a federal injunction of state proceedings in the simultaneous filing cases would be improper if it were based on the theory that the antitrust laws create an "expressly authorized" exception to the Anti-Injunction Act.²⁷⁴

²⁶⁸ Justices Stevens, Brennan, White and Marshall.

²⁶⁹ *Vendo Co.*, 433 U.S. at 654 (Stevens, J., dissenting).

²⁷⁰ *Id.* at 646 (Stevens, J., dissenting).

²⁷¹ *Id.* at 654 (Stevens, J., dissenting).

²⁷² Likewise, it would appear that the same six members of the Court agreed that the absence of legislative history indicating any express concern by Congress that state judicial proceedings could violate a particular statute should not preclude a federal injunction of state judicial proceedings when such proceedings are in fact used to violate federal statute. See generally Redish, *supra* note 253, at 275.

²⁷³ See *supra* notes 180-99 and accompanying text.

²⁷⁴ See *Kurek v. Pleasure Driveway and Park Dist. of Peoria, Ill.*, 574 F.2d 892 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) (federal court having jurisdiction over antitrust claim could not enjoin federal antitrust defendant from enforcing state court judgment even if state claim were itself an attempt by the state plaintiff to violate antitrust law). The court interpreted *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) as creating

"Where Necessary in Aid of Its Jurisdiction, or to
Protect or Effectuate Its Judgments"

Even if a federal injunction of state proceedings is not "expressly authorized" in a particular federal statute, the federal court may nevertheless enjoin state proceedings if the injunction is necessary (1) in aid of the jurisdiction of the federal court, or (2) necessary to protect or give effect to a federal court judgment. The second of these two exceptions is relevant only after a final judgment has been entered by a federal court and after state litigation has been commenced that would frustrate or interfere with that judgement.²⁷⁵

The facts of the *Three J Farms* case²⁷⁶ in the *Corrugated Container* litigation support a principled argument in favor of a federal injunction against state proceedings. The plaintiffs filed an action under the South Carolina antitrust statute while fifty federal antitrust actions arising out of the same operative facts had previously been consolidated. The same plaintiffs, represented by the same counsel, were also parties in the consolidated federal proceedings. The multidistrict court enjoined the plaintiffs from pursuing their state lawsuit, and the Fifth Circuit affirmed, holding that the injunction was justified because the state proceedings would challenge the jurisdiction of the federal court.²⁷⁷ Additionally, since a class action agreement had already been approved by the district court, the Fifth Circuit held that the state proceedings would interfere with the federal court's ability to effectuate its judgments.²⁷⁸

an "expressly authorized" exception to the federal antitrust laws only if the state claims were "baseless and repetitive," and were filed in order to violate the federal antitrust laws. This is consistent with established doctrine that "a pattern of baseless, repetitive claims" in state court may themselves constitute an antitrust violation. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

²⁷⁵ See cases and sources cited *infra* notes 280-86 and accompanying text.

²⁷⁶ *Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982).

²⁷⁷ *Three J Farms*, 659 F.2d at 1334.

²⁷⁸ *Id.* at 1334-35. The Fifth Circuit held that once the court in the consolidated *Corrugated Container* litigation had approved a settlement agreement between the parties, but before it had entered judgment making the settlement agreement itself a final judgment, the issuance of the injunction against the simultaneous state proceedings was proper. *In re Corrugated Container Antitrust Litigation (Three J Farms)*, 659 F.2d 1332, 1335 (5th Cir. 1981), cert. denied, 456 U.S. 1012 (1982). The settlement agreement itself, as subsequently approved in part by the Fifth Circuit, provided for the release of state law claims pending in the South Carolina courts. See *In re Corrugated Container Antitrust Litigation (Adams Extract Co. v. Chesapeake Corp.)*, 643 F.2d 196, 222 (5th Cir. 1981). The Fifth Circuit observed that the South Carolina state plaintiffs were themselves members of the plaintiff class in the federal multidistrict litigation and that they had an adequate opportunity to "opt out of the class and litigate their state claims in state court." *Id.* at 222. Furthermore, the state law plaintiffs knew that the settlement being negotiated was likely to compromise the state law claims before they were asked to opt out. The Fifth Circuit concluded that the state law plaintiffs nevertheless wanted "to participate in the [federal] class, share in the fruits of the class settlement negotiations, and still be free to litigate

Because the Fifth Circuit rested its approval of the federal injunction of state proceedings on the theory that a class action settlement was a judgment that could be protected by federal injunction, the Fifth Circuit did not fully consider the more difficult question: should the mere fact that there is an ongoing multidistrict federal antitrust litigation be sufficient to support an injunction by the transferee federal court of any state proceeding arising out of the same operative facts? The doctrine that a federal court can "protect its jurisdiction" by enjoining parallel state proceedings has been construed narrowly. As Justice Rehnquist observed in *Vendo*, the Supreme Court has "never viewed parallel *in personam* actions as interfering with the jurisdiction of either court."²⁷⁹ It is very difficult to carve an exception out of the Anti-Injunction Act that complex federal litigation, which has been consolidated into a single district, should be treated any differently.

The provision of the Anti-Injunction Act permitting an injunction when necessary in aid of the jurisdiction of the federal court is most generally applied when a federal proceeding in rem is underway, and a state court subsequently attempts to attach the same res in a parallel proceeding.²⁸⁰ Although there are some instances of a federal injunction of state proceedings under this exception when both proceedings are in personam,²⁸¹ the general rule is to the contrary.²⁸² It does not matter that a state judgment will have collateral estoppel effect with respect to any subsequent

their state claims. In short, the objectors felt entitled to the bird in the hand while pursuing the flock in the bush." *Id.*

Under these circumstances, where the federal court has approved a settlement that will be entered as a final judgment, where one of the provisions of that judgment is the release of state law claims, and where the state law claims are being asserted by persons who themselves are parties in the multidistrict federal litigation, then the use of a federal injunction by the multidistrict court to stay the state proceedings appears to be an absolutely reasonable and necessary mechanism by which the federal court can effectuate its judgment.

One problem with the use of an injunction to effectuate the judgment of a federal court under the circumstances of the *Corrugated Container* litigation is the requirement that before a federal court can enjoin state litigation on the grounds that the injunction is necessary to protect or effectuate the federal court judgment, the issues covered by the federal judgment must be "fully and finally adjudicated" by the federal court. *See Lamb Enter., Inc. v. Kiroff*, 549 F.2d 1052 (6th Cir. 1977), *cert. denied*, 431 U.S. 968 (1977) (quoting *International Assoc. of Machinists and Aerospace Workers v. Nix*, 512 F.2d 125, 130 (5th Cir. 1975)). In the *Corrugated Container* case, the judgment sought to be protected by the injunction was a negotiated settlement agreement. However, the close scrutiny given by the district and the circuit courts to this agreement and to federal class action settlement agreements in general, should remove any doubt that this was a "fully and finally adjudicated" judgment of a federal court. *See, e.g., Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981) (detailed analysis of settlement agreement). *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 422.

²⁷⁹ *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (emphasis in original).

²⁸⁰ *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 4225 n.3.

²⁸¹ *See generally id.* at § 4225 n.7.

²⁸² *See Vendo Co.*, 433 U.S. at 641-42; *Carter v. Ogden Corp.*, 524 F.2d 74, 76 (5th Cir. 1975). For criticism of the general rule see M. REDISH, *supra* note 253, at 285-90.

federal judgment.²⁸³ Nor does it make a difference that the question in the state proceeding arises under federal law;²⁸⁴ indeed, it appears that a federal injunction is improper even when the state court has no jurisdiction over the matter because the case is within the exclusive jurisdiction of the federal court.²⁸⁵ There is simply no precedent supporting the proposition that a federal court can "protect its jurisdiction" by enjoining a parallel state proceeding when the proceeding is in personam and seeks to enforce a legitimate state remedy permitted by Congress.²⁸⁶

The Federal Injunction and the Multidistrict Court

When the Fifth Circuit recently affirmed the multidistrict federal court's injunction of the state proceedings in the *Corrugated Container* case,²⁸⁷ the court did not acknowledge the equivocal Supreme Court precedent in *Vendo*.²⁸⁸ The Fifth Circuit instead considered the propriety of the federal injunction against the state proceeding under the two different standards: (1) whether the injunction was necessary in aid of the federal court's jurisdiction;²⁸⁹ and (2) whether it was necessary to effectuate the judgment of a federal court.²⁹⁰

One possibility that the Fifth Circuit did not consider—perhaps because there is no precedent for doing so—is that the federal multidistrict litigation statute²⁹¹ itself might "expressly authorize" a federal injunction of state proceedings in certain circumstances.²⁹² Of course, a rule that anytime

²⁸³ See *Vernitron Corp. v. Benjamin*, 440 F.2d 105 (2nd Cir. 1971), *cert. denied*, 402 U.S. 987 (1971); *Essex Systems Co. v. Steinberg*, 335 F. Supp. 298 (S.D.N.Y. 1971), *aff'd*, 447 F.2d 1405 (2nd Cir. 1971).

²⁸⁴ *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295-96 (1970); *Vernitron Corp. v. Benjamin*, 440 F.2d 105 (2nd Cir. 1971), *cert. denied*, 402 U.S. 87 (1971).

²⁸⁵ *Amalgamated Clothing Workers of Am. v. Richman Bros.*, 348 U.S. 511 (1955). *But cf. Capital Serv. Inc. v. N.L.R.B.*, 347 U.S. 501 (1954) (N.L.R.B., not private party seeking injunction).

²⁸⁶ It would therefore appear that a finding by a federal court that a separate state-court antitrust filing was really an "artfully pleaded" federal complaint would not of itself justify a federal injunction against the state court proceedings. See *supra* text accompanying notes 225-38.

²⁸⁷ *Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

²⁸⁸ *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). See *supra* notes 256-74 and accompanying text.

²⁸⁹ *Three J Farms*, 659 F.2d at 1334-35.

²⁹⁰ *Id.* at 1335.

²⁹¹ 28 U.S.C. § 1407 (1976).

²⁹² One initial problem in determining that 28 U.S.C. § 1407 (1976) authorizes a federal injunction of state court proceedings is that the language of § 1407 nowhere provides for any injunction of any kind. As a general rule, when the court considers whether or not a federal statute "expressly authorizes" a federal court injunction of state proceedings, the federal statute at issue itself contains a provision permitting injunctive relief, and it is that particular provision that is at issue in the case. Thus, for example, the precise holding

several federal claims have been consolidated and transferred the transferee court may enjoin simultaneous state proceedings based on the same facts would thwart the policy behind the Anti-Injunction Act. However, the facts of some of the simultaneous state antitrust suits make a compelling argument that sometimes such a federal injunction is desirable.

For example, the state complaint in the *Corrugated Container* litigation can be characterized as nothing more than an attempt to coerce the defendant to settle by forcing it to engage in very expensive identical litigation in two forums.²⁹³ The gist of the state complaint was identical to the one filed in the multidistrict proceeding; indeed, the plaintiffs copied large parts of the complaint verbatim. The plaintiffs sought relief in the state action which could have been obtained under federal law or that could have been joined as a pendant claim in the federal action.²⁹⁴ In this particular case the plaintiffs went to great lengths to avoid the federal forum and even attempted to prevent diversity removal by joining an improper party as plaintiff.²⁹⁵

If it is clear that a plaintiff is seeking relief under state law which can be granted only by a state court, then any attempt by the federal court to federalize the state complaint and remove it or otherwise interfere with the plaintiff's action runs contrary to the principles of federalism embodied in the two-tier, federal-state antitrust enforcement scheme and the Anti-Injunction Act. On the other hand, if the plaintiff could obtain all the relief it is entitled to in the consolidated federal proceeding, including full consideration of the state law claim, then the plaintiff's state claim can be characterized as an effort to defeat the policy behind 28 U.S.C. section 1407 of avoiding duplicative litigation. Where those criteria are met, an injunction from the federal transferee court would be good policy, and arguably would fall within an exception to the Anti-Injunction Act.²⁹⁶

in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), is that § 16 of the Clayton Act (15 U.S.C. § 26 (1976)), which permits private plaintiffs to have injunctive relief against antitrust violations, did not "expressly authorize" a federal injunction against state proceedings under the circumstances of that case. Nevertheless, federal injunctions issued under federal statutes that contain no express provision for injunctive relief are a common occurrence, and the power of a federal court to issue an injunction in a federal question case rests not merely on statutory authorization but on centuries-old principles of equity. See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); 11 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 2942. At least one federal circuit court has held that a federal statute that makes no provision for private injunctive relief nevertheless "expressly authorizes" an injunction against state proceedings, where continuation of the state proceedings might violate the policy of the federal statute. *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949 (8th Cir. 1976) (holding that the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976) authorizes a federal injunction of state proceedings).

²⁹³ See *Three J Farms, Inc. v. Alton Box Bd. Co.*, 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), *rev'd*, 609 F.2d 112 (4th Cir. 1979).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at ¶ 76,551.

²⁹⁶ See *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976).

When Should a Federal Court Enjoin State Antitrust Proceedings?

The policy of federalism contained in the Anti-Injunction Act²⁹⁷ dictates that federal courts should rarely halt state judicial proceedings. An understanding of the proper relationship between federal and state antitrust law can be a guide in determining when the federal court should step aside. As a basic premise, states are entitled to have their own antitrust laws, even when they are different from federal law in their scope or application. It necessarily follows that plaintiffs must be permitted to take advantage of those differences or else the state law becomes impotent. On the other hand, simultaneous filing of state antitrust claims when federal multidistrict litigation is ongoing imposes difficult burdens on both court systems and the antitrust litigants. The transferor court's decision to enjoin a particular state proceeding must rest on its determination whether a particular state claim is principled or brought for the purpose of harassment.

That determination rests on the answer to a single question: could the plaintiff obtain the relief it is seeking in the federal multidistrict litigation? In most instances the answer will be yes.²⁹⁸ State antitrust law is often identical to federal antitrust law. Furthermore, when state law is different, the plaintiff will generally be able to bring both a federal and a state claim into the federal court under the court's pendent jurisdiction. When the plaintiff has the option of filing in federal court, a federal injunction of state proceedings could be used to force the plaintiff to exercise that option.

There are some instances, however, where the state law or a state procedural rule will entitle the plaintiff to a kind of relief unavailable in federal court; the liberalized California procedural rules for class actions provide an example.²⁹⁹ In such instances, a federal injunction enjoining the state proceedings would subvert the fundamental policies behind the rule permitting state antitrust laws in the federal system.

What Will the Federal Injunction of State Proceedings Accomplish?

In simultaneous filing cases such as the *Corrugated Container*³⁰⁰ litigation, a federal injunction enjoining the state proceedings would in effect force the plaintiff to bring all of its claims into the federal court. Once a federal judgment had been entered, claim preclusion would bar not only all claims actually litigated in the federal proceedings, but all which could

²⁹⁷ 28 U.S.C. § 2283 (1978).

²⁹⁸ See *supra* notes 193-96 and accompanying text.

²⁹⁹ See *supra* notes 193-204 and accompanying text.

³⁰⁰ *Three J Farms v. Plaintiffs' Steering Comm.*, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982). See *supra* notes 205-18 and accompanying text.

have been litigated.³⁰¹ Since the plaintiff could have attached its state law claims to the federal claim under the federal court's pendent jurisdiction, the state law claim would be barred.³⁰² If a plaintiff attempted to raise a state law claim under such circumstances, the federal court which issued the earlier judgment could permanently enjoin the new action under the exception to the Anti-Injunction Act permitting state proceedings to be enjoined where necessary to protect or effectuate its judgments.³⁰³

The situation is more complex when the state-filing plaintiff is not a party in the federal multidistrict litigation. One probable effect of the injunction, of course, is that the federal litigation will proceed to judgment but the state litigation will not. It is therefore important to determine the effect of a federal antitrust judgment as against a plaintiff in a state antitrust case arising out of the same operative facts, but who was not a party in the federal proceeding from which the judgment issued. Two issues must be considered: (1) the collateral estoppel or issue preclusion effect of a federal antitrust judgment against subsequent proceedings in state court under state law; and (2) the circumstances under which the doctrine of offensive collateral estoppel would permit a state antitrust plaintiff to rely on a prior federal antitrust judgment adverse to the defendant.

It is relatively clear today that the general policies against relitigation of the same claims or issues apply as between federal and state antitrust claims. First, although the two bodies of law are created by different sovereigns, as a general matter with respect to a particular claim they create the same "cause of action." For example, in *Nash County Board of Education v. Biltmore Co.*,³⁰⁴ the Fourth Circuit held that a consent

³⁰¹ See *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 (Tent. Draft No. 5, 1978).

³⁰² The doctrine of claim preclusion would apply not only to the same party in the federal and state antitrust claims, but also to anyone adjudged to be in "privity" with that party. See *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981). Although the concept of privity in the res judicata context is elusive, the term generally refers to "a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Act. Community Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963). An interesting question is whether or not a person who opts out of a federal class action can in any circumstances be considered to be in privity with those who remain to litigate the claim. As a general rule, this is not the case. A person who opts out of a rule 23(b)(3) class action is free to litigate his or her own claim even though the class action proceeded to judgment. But see Note, *Offensive Assertion of Collateral Estoppel By Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189, 1207 n.105 (1980) (argument advocating privity). For a discussion of preclusion, see generally 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at §§ 448-62.

³⁰³ See *Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35 (2nd Cir. 1978); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *Walter E. Heller & Co. v. Cox*, 379 F. Supp. 299 (S.D.N.Y. 1974).

³⁰⁴ 640 F.2d 484 (4th Cir. 1981).

decree under state antitrust law was res judicata as to a subsequent federal proceeding because the two claims, although based on different bodies of statutory law, were really the same "cause of action."³⁰⁵ In the converse situation, where the federal judgment precedes the state claim, the same result is reached.³⁰⁶

When the state plaintiff is not a party in the federal action, claim preclusion will not normally bar the state proceedings unless the state plaintiff is found to be in privity with a party in the earlier federal action.³⁰⁷ However, issue preclusion, or collateral estoppel, permits a certain amount of nonmutuality so that it can be applied in favor of persons who were not parties in the earlier proceeding.³⁰⁸

Issue preclusion generally has a broader application to federal and state actions than claim preclusion. Although the federal and state "causes of action" of the plaintiff may be somewhat different, the doctrine of col-

³⁰⁵ *Nash County Bd. of Educ.*, 640 F.2d at 488.

The two suits allege the same wrongful act, the same illegal price-fixing conspiracy, the same operative facts in support of such conspiracy. The state and federal statutes upon which the two actions are based are identical in language except in the requirement of the federal statute, but not of the state statute, of a showing of interstate commerce. In both cases, the evidence will be identical and the damages recoverable and the relief available the same.

Id. at 488. In cases where the state antitrust law and the federal antitrust law are substantively different the claim preclusion effect is generally weaker. For example, one court has held that if the first action was brought in a state court under a statute that did not authorize recovery of treble damages, then the state judgment will not necessarily be preclusive of a later claim under the federal antitrust laws. *See Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979), holding that the principle of claim preclusion (res judicata) must be limited to claims "capable of recovery" in the former action. *See also Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358, 363 (6th Cir. 1967); *see also Marrese v. American Academy of Orthopedic Surgeons*, 524 F. Supp. 389 (N.D. Ill. 1981) (distinguishing *Nash, supra*, because the earlier state filing was not under state antitrust law but under the common law of unfair business practices). *See Nationwide Mut. Ins. Co. v. Automotive Service Councils of Del.*, 1981-1 Trade Cas. (CCH) ¶ 63,958 (D. Del. 1981); *but see Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981). *See generally Note, The Res Judicata Effect of Prior State Court Judgments in Sherman Act Suits: Exalting Substance Over Form*, 51 *FORDHAM L. REV.* 1374 (1983).

³⁰⁶ *See Bocardo v. Safeway Stores, Inc.*, 184 Cal. Rptr. 903 (1982) (holding that dismissal in a federal antitrust action because the plaintiffs were indirect purchasers precluded the plaintiffs from bringing an indirect purchaser action under California state antitrust law, because the action could have been brought as a pendent claim to the earlier federal action); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (judgment adverse to plaintiffs in federal antitrust case was res judicata to an action brought in state court under the Texas antitrust law and therefore fell within the exception to the Anti-Injunction Act permitting a federal court to enjoin such proceedings where necessary to protect or effectuate its judgment); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring); *Harper Plastics, Inc. v. Amoco Chem. Corp.*, 657 F.2d 939, 947 (7th Cir. 1981); *Belliston v. Texaco*, 521 P.2d 379, 382 (Utah, 1974); *Ford Motor Co. v. Superior Ct.*, 35 Cal. App. 3d 676, 680, 110 Cal. Rptr. 59, 61-62 (1973); *McCann v. Whitney*, 25 N.Y.S.2d 354, 357 (1940); *RESTATEMENT (SECOND) OF JUDGMENTS* § 61.1, reporter's note, comment e, illustration 10 (Tent. Draft No. 5, 1978).

³⁰⁷ *See supra* note 302.

³⁰⁸ *See generally* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at §§ 4463-65.

lateral estoppel would bar the relitigation in state court of an issue actually litigated in the federal proceeding and necessary to the federal court judgment.

The provision of the Anti-Injunction Act permitting a federal court to enjoin a state proceeding in order to protect or effectuate a federal judgment applies as much to issue preclusion as it does to claim preclusion. A federal court could permanently enjoin state court relitigation of an issue that was previously litigated in federal court, if the party seeking relitigation had been a party in the earlier action and if the issue had been decided against that party's interests.³⁰⁹

On the other hand, the due process clause generally requires that a person not a party in the first action cannot be collaterally estopped in the second action with respect to a determination made contrary to its interest in the first action. For example, if a federal multidistrict litigation eventuated in a federal judgment adverse to the plaintiffs, as a basic principle a non-party in that proceeding would not be bound by the judgment if it were a plaintiff in subsequent state proceedings.³¹⁰

An interesting question is the appropriateness of a state plaintiff's use of "offensive" collateral estoppel³¹¹ when an earlier federal judgment has been rendered adverse to the same defendants. Although the full faith and credit clause of the U.S. Constitution does not by its own terms require a state court to honor a federal court's judgment,³¹² courts considering the question have uniformly held that state courts are so bound, upon a variety of theories.³¹³ Additionally, with respect to federal question cases, it seems relatively clear today that federal law governs the applicability of issue preclusion when the first judgment is in federal court and the second proceeding is in state court.³¹⁴

³⁰⁹ See *Bank of Heflin v. Miles*, 621 F.2d 108 (5th Cir. 1980); *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1976); *Johnson v. Radford*, 449 F.2d 115 (5th Cir. 1971); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62 (N.D. Cal. 1976).

³¹⁰ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 110, 110 (1969); however, the rule has been eroded somewhat in recent years. See generally 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 449 (1981); See Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383 (1983). Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551 (1979).

³¹¹ Many commentators today use instead the terms "nonmutual estoppel" or "nonmutual issue preclusion." However, those terms apply generally to two quite different sets of circumstances: (1) where a plaintiff not a party to the former litigation is seeking to preclude relitigation of an issue determined adversely to a defendant who is a party in both cases; (2) where a defendant not a party to the former litigation is seeking to preclude relitigation of an issue determined adversely to a plaintiff who is a party in both cases. The term "offensive collateral estoppel" refers to only the first instance.

³¹² See *Degnan, Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

³¹³ See, e.g., *Levy v. Cohen*, 19 Cal. 3d 165, 173, 137 Cal. Rptr. 162, 167 (1977). *Younger v. Jensen*, 26 Cal. 3d 397, 411, 161 Cal. Rptr. 905, 914 (1980). See generally 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 4468.

³¹⁴ See *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Stoll v. Gottlieb*, 305 U.S. 165 (1938);

The applicability of a federal standard is uncertain, however, when the federal judgment is itself decided under state law.³¹⁵ It is especially unclear when the federal judgment is decided under a federal statute and the subsequent state proceeding is brought under a state statute that is similar to the federal statute, as would be the case in separately filed antitrust cases.³¹⁶ As a basic premise, a state court is the best interpreter of its own state antitrust statutes. The question whether a particular state law issue has been precluded by an earlier determination made in federal court under federal law should present the state court with an opportunity to interpret its own law.

In *R.E. Spriggs Co. v. Adolph Coors Co.*,³¹⁷ the California Court of Appeal held that a federal consent decree obtained by the Federal Trade Commission under the federal antitrust laws could be used offensively by a private plaintiff in a later action filed under state law. The court suggested that the conclusions of law made in the earlier federal proceeding would not necessarily be preclusive in the subsequent state proceeding because the substantive law of the two jurisdictions might not be identical.³¹⁸ However, the plaintiffs could use collateral estoppel offensively when an identical issue of fact litigated and judicially determined in the previous federal action was also raised in the subsequent state action.³¹⁹

Such a use of offensive collateral estoppel is certainly consistent with the general principles of minimizing duplicate litigation. It is unclear, however, whether the state court is *obligated*, as a matter of federal law, to give offensive collateral estoppel effect to a prior federal fact-finding under such circumstances, or whether that question is entirely one of state law.

The question may not be all that important. In fact, the decision whether to permit offensive collateral estoppel is left to the discretion of the judge. Even under the federal standard, there are many cases where the judge could go either way. *Parklane Hosiery Co. v. Shore*³²⁰ is the Supreme Court's most elaborate attempt recently to delineate the circumstances under which offensive collateral estoppel is appropriate in federal actions. *Parklane* involved a shareholder's derivative suit that alleged, in part,

RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1980); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 4468 n.27.

³¹⁵ For an account of some of the confusion, see C. WRIGHT, A. MILLER & E. COOPER, *supra* note 178, at § 4472, and Degnan, *supra* note 312, where Professor Degnan argues that in all such cases the effects of res judicata and collateral estoppel should be determined under the law of the court that issued the first judgment.

³¹⁶ See, e.g., *R. E. Spriggs Co. v. Adolph Coors Co.*, 94 Cal. App. 3d 419, 156 Cal. Rptr. 738 (1979). See *supra* text accompanying notes 120-25.

³¹⁷ *Adolph Coors*, 94 Cal. App. 3d 419, 156 Cal. Rptr. 738 (1979).

³¹⁸ 94 Cal. App. 3d at 429, 156 Cal. Rptr. at 743.

³¹⁹ *Id.*

³²⁰ 439 U.S. 322 (1979).

that the defendant had produced a false and misleading proxy statement.³²¹ While the private shareholders' suit was pending, the SEC brought a suit for an injunction and obtained a judgment that established that the proxy statement was in fact false and misleading.³²² Thereafter, the private plaintiffs moved for summary judgment, alleging that the determinations contained in the SEC judgment were dispositive of their own lawsuit.³²³

In holding that offensive collateral estoppel was appropriate in this circumstance, the Supreme Court established four criteria that the federal courts should use in deciding whether to permit offensive collateral estoppel: (1) whether the plaintiff seeking to use collateral estoppel in the second action could have joined in the earlier action—if it could have, then to permit it to use collateral estoppel offensively would encourage rather than discourage duplicative litigation;³²⁴ (2) whether the defendant could have foreseen the use of offensive collateral estoppel in a later action and therefore would have had the incentive to litigate the former action “fully and vigorously;”³²⁵ (3) whether “the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant;”³²⁶ and (4) whether the second action affords the defendant procedural opportunities that were not available in the first action and that might “readily cause a different result.”³²⁷

The Supreme Court made it clear that “the preferable approach for dealing with these problems in the federal courts is not to preclude the use of collateral estoppel, but to grant trial courts broad discretion to determine when it is to be applied.”³²⁸ These criteria are not constitutionally or statutorily mandated, and there is nothing in the Supreme Court's opinion to suggest that a state court is bound by them.

Parklane suggests that a state antitrust plaintiff should not have the benefit of offensive collateral estoppel if it could have been a party-plaintiff in the earlier federal litigation but chose not to participate, either by failing to file a claim,³²⁹ or by opting-out of a rule 23(b)(3) class action.³³⁰ To

³²¹ *Parklane Hosiery*, 439 U.S. at 324.

³²² *Id.* at 324-25.

³²³ *Id.* at 325.

³²⁴ *Id.* at 331.

³²⁵ *Id.* at 332.

³²⁶ *Id.* at 330.

³²⁷ *Id.* at 331.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See generally Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189 (1980). In *GAF Corp. v. Eastman Kodak Co.*, [July-Dec.] ANTITRUST TRADE REG. REP. (BNA) No. 1027, at F-1 (Aug. 3, 1981), *cert. denied*, 444 U.S. 1093 (1980), the district court held that GAF could take advantage of offensive collateral estoppel with respect to prior determinations made against Kodak in a lawsuit brought by Berkey Photo Co., although theoretically it could have been a party in the prior action. During pretrial procedures in the Berkey Photo case, GAF filed its own lawsuit against Kodak based largely on the same operative facts. Both actions were assigned to the same

permit a plaintiff to assert collateral estoppel offensively under such circumstances would thwart the basic policy against duplicative litigation. However, it is not clear that a state court is bound by the rules that the Supreme Court has imposed upon the federal court system.³³¹

CONCLUSION

State antitrust law exists largely at the pleasure of Congress. The framers of the Sherman Act clearly intended to preserve state antitrust enforcement. However, their perception of the limits of state and federal power were so different from our perception today that it is no longer meaningful to speak about the intent of the Fifty-First Congress. In 1890, state and federal antitrust law was perceived as operating in mutually exclusive arenas. Today, however, the jurisdictional boundaries of state and federal antitrust are almost concurrent.

States now have the power to condemn antitrust violations that occur anywhere in the nation, provided that there are sufficient harmful effects within the state itself. The commerce clause of the United States Constitution is not a substantial barrier to the application of a state's antitrust law to activities occurring outside the state. The Supreme Court has insisted upon upholding state antitrust laws under the dormant commerce clause by holding as a general matter that such laws do not interfere with the interstate flow of goods and do not discriminate against interstate commerce. At the same time, the courts refuse to find state antitrust laws preempted by federal antitrust law, unless the conflict is so sharp that compliance with the state law would require violation of the federal law. Even in that instance, the "state action" exemption from the federal antitrust laws might permit enforcement of the state law.

judge and the proceedings were "coordinated to some degree." *Id.* at F-1. Both plaintiffs wanted separate trials but the defendant sought a consolidated trial. *Id.* at F-5. The judge's decision to grant separate trials was based on a determination that the *GAF* case would be larger and more complex; that the *Berkey* case was at a more advanced stage and would be ready for trial earlier; that there were counterclaims against *Berkey* but none against *GAF*. *Id.* at F-5. Finally, the defendant had insisted on a jury trial and a combined trial would have rendered the case very complex. *Id.* at F-5. Under these circumstances, the southern district of New York ruled that *GAF* was not a party who could easily have joined in the earlier trial; therefore, *GAF* could assert offensive collateral estoppel with respect to issues determined against *Kodak* in the earlier *Berkey* trial. *Id.* at F-5. *GAF* was "not the 'wait and see' plaintiff contemplated by *Parklane Hosiery*." *Id.* at F-5.

³³¹ A certain amount of discretion in state court judges is in order. After all, it is the burden on their own court system and not on the federal courts that they are concerned with. For example, if the plaintiff can obtain the relief it wants only by going into state court, as in the case of a Cartwright Act class action plaintiff seeking fluid recovery, then the plaintiff should not be denied the benefit of collateral estoppel for failing to join the federal proceeding. To do so would deprive the plaintiff of the opportunity to seek the relief that the state law grants. In such a situation it would be quite appropriate to hold that the state plaintiff could not have joined the federal proceeding, and therefore should be permitted to use collateral estoppel offensively in the subsequent state proceeding.

Similarly, under the choice-of-law analysis currently applied by the United States Supreme Court, a state could apply its law to an out-of-state transaction almost any time it could obtain personal jurisdiction over the defendant. As a result, the domestic jurisdictional reach of state antitrust law is as great as the reach of federal antitrust law. Furthermore, state law generally does not provide defendants with the same venue protection that federal law does. If a state court can obtain personal jurisdiction over an out-of-state defendant, state law generally creates at least one permissible venue within the state. As a matter of policy, extraterritorial application of state antitrust law ought to be limited to those instances when the state court has specific personal jurisdiction over the defendant or when the cause of action arises out of the defendant's activities within the forum state.

Aggressive application of state antitrust law on a nationwide scale can play havoc with the two-tier, federal-state antitrust enforcement scheme, particularly when the federal and state laws are inconsistent or provide different remedies. This tension exists today with respect to those states that have given indirect purchasers a damage action contrary to federal law. The combined application of federal and state antitrust laws against the same defendant may require the defendant to pay treble damages twice for the same injury.

State antitrust law also interferes with the federal antitrust enforcement scheme when state law is used to defeat the federal policy minimizing duplicative litigation by consolidation and transfer of multi-party claims. So far, the federal courts have had difficulty in dealing with separate state actions filed simultaneously with consolidated federal litigation. In some instances, the federal courts have held that a separate state filing is really an artfully pleaded federal complaint, and have ordered removal. In one instance, a federal court has enjoined the simultaneous state proceeding. Both of these practices represent novel and questionable exercises of federal judicial power, particularly if they are not carefully limited. Before interfering with state proceedings, a federal court should consider why the state-law plaintiff is in state court in the first place. If the plaintiff filed in state court in order to obtain a remedy unavailable in federal court, then the federal judge has no choice but to permit the state litigation to continue. However, if the plaintiff could have obtained the same relief in federal court, then the federal judge can infer that the plaintiff is attempting to put unwarranted pressure on the defendant. In such cases removal or an injunction of state court proceedings might be appropriate. In all instances, however, the federal court must recognize that states are entitled to their own antitrust laws, even when different from federal law. Only that premise will protect the integrity of state antitrust law.